IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 20

STATE OF CALIFORNIA AND BOARD OF STATE HARBOR COMMISSIONERS FOR SAN FRANCISCO HARBOR,

Appellants,

vs.

UNITED STATES OF AMERICA AND UNITED STATES MARITIME COMMISSION, ENCINAL TERMINALS, HOWARD TERMINAL, AND PARR-RICHMOND TERMINAL CORPORATION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

I

OPINION OF THE COURT BELOW

The opinion of the District Court of the United States for the Northern District of California, Southern Division, was filed on August 20, 1942, and is reported in 46 Fed. Supp. 474.

II

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

The final decree of the United States District Court was entered December 1, 1942 (R. 108). The Petition for Appeal was filed December 31, 1942 (R. 111), and an order allowing appeal and fixing amount of cost bond on appeal was filed the same day (R. 114). Probable Jurisdiction was noted by the United States Supreme Court on April 12 (R. 1327).

Jurisdiction of this Court is invoked under Section 210 of the Judicial Code, as amended (U. S. Code, Title 28, Sections 47, 47a), and Section 31 of the Shipping Act, 1916, as amended (U. S. Code, Title 46, Section 830; 39 Stat. 738).

Section 210 of the Judicial Code, as amended (U. S. Code, Title 28, Sec. 47a) provides as follows:

> "A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney

general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court." (Mar. 3, 1911, c. 231, sec. 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)

Title 28, Sec. 47, U. S. Code, provides in part as to an appeal from a final decree of a statutory three-judge court:

"* * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges

and the same procedure as to expedition and appeal shall apply." (Act of Oct. 22, 1913, c. 32, 38 Stat. 220.)

These provisions of law are made applicable to orders of the United States Shipping Board (now United States Maritime Commission), such as the order involved in this appeal. Section 31 of the Shipping Act, 1916, as amended (U. S. Code, Title 46, Sec. 830; 39 Stat. 738) provides as follows:

"The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district courts having jurisdiction of the parties." (Sept. 7, 1916, c. 451, Sec. 31, 39 Stat. 738.)

III

STATEMENT OF THE CASE

This is an appeal from a decree of a specially constituted three-judge District Court for the Northern District of California, Southern Division, dismissing appellants' petition and bill for injunction to set aside, annul and enjoin an affirmative order of the United States Maritime Commission issued and made on September 11, 1941 in a proceeding before said Commission designated "IN THE MATTER OF SERVICES, RATES,

CHARGES, TOLLS, RENTALS, RULES, REGULATIONS, CLASSIFICATIONS, AGREEMENTS, ACTS, PRACTICES, AND OPERATIONS OF THE SAN FRANCISCO BAY AREA TERMINALS NAMED HEREIN". (R. 108-109)

A short history of the proceedings before the Maritime Commission which resulted in the filing of the bill or complaint of plaintiff and appellees will serve to clarify the issues. As appears from the allegations of paragraph IV said bill and complaint (R. 2-4) admitted by the answers, the Maritime Commission, on November 7, 1939, on its own motion, made its order initiating the above mentioned proceeding before it. Subsequently, appellants were named as respondents therein.

Hearings were held before the Commission on February 13, to 19, and 20 to 21, 1940, and, after a continuance, on October 7 to 9, 1940, and the matter submitted on briefs filed. At the beginning of the hearing appellants herein appeared specially and moved to dismiss the proceeding as to each of them on the ground that the Commission had no jurisdiction of either of them or of the subject matter of the investigation so far as it affected either of them. At the conclusion of the hearing the motion was again made on the same grounds. A true copy of this motion is attached to the Answer of Appellees United States of America and United States Maritime Commission as "Exhibit A" (R.

69-70). Both motions were denied by the Chief Regulations Examiner.

Briefs were filed; the Examiner made his proposed report and recommended findings. Recommended findings numbers 1, 6, 8 and 9 were duly excepted to by appellants and briefs in support of the exceptions filed; the matter was orally argued before the Commission on July 9, 1941. Subsequently, on September 11, 1941, the Commission made and filed its order (R. 13-45).

On October 17, 1941, appellants herein filed with the Commission their petition for reconsideration of said order (R. 45-50) which petition was denied by the Commission on October 23, 1941 (R. 68).

In its Report and its said order of September 11, 1941 (R. 13-43), the Commission found, among other things, as follows:

1. That Congress had constitutional power to regulate the activities of appellants (under investigation and referred to in the Report).

2. That appellants were within the definition of "other persons" as defined in Section 1 of the Shipping Act of 1916.

3. That appellants have failed in certain instances to give reasonable notice of tariff changes and prescribing a thirty (30) day prior notice in the future.

4. That the free time periods allowed by appellants for the removal of cargo from the facilities under its jurisdiction are unduly prejudicial and

preferential in violation of Section 16 and unreasonable in violation of Section 17 of the Shipping Act, 1916, as amended, and that any such allowance greater that the period set forth in Table 1 attached to said Order, which reduces appellants' free time allowance in two respects, viz., on outbound intercoastal and foreign trades from the existing ten (10) days to seven (7) days, will in the future be unduly prejudicial and preferential and unreasonable.

5. That appellants' rates, rules, regulations and practices relating to wharf demurrage and wharf storage are non-compensatory resulting in unequal treatment of users and non-users of such services. That said rates, rules, regulations and practices are unduly prejudicial and preferential in violation of Section 16 and unreasonable in violation of Section 17 of the Shipping Act, 1916, as amended and that in the future the assessing and collecting of any charge for such wharf demurrage and wharf storage lower than the schedule of charges prescribed in said order would be unduly prejudicial and preferential and unreasonable. That the rates prescribed for such wharf storage by said Order are set forth therein (R. 44-45) and in the appendix thereto (R. 42-43).

The petition in the United States District Court for bill of injunction was filed on October 21, 1941, by the State of California and Board of State Harbor Commissioners for San Francisco Harbor,

appellants herein (R. 1-50). The answer of defendants, United States of America, and United States Maritime Commission, appellees herein, to said petition and bill, was filed December 19, 1941 (R. 66-70). The answers of interveners, Encinal Terminal, Parr-Richmond Terminal Corporation, and Howard Terminal, all appellees herein, were filed on January 26, 1943 (R. 74-75), January 23, 1942 (R. 76-77) and January 28, 1942 (R. 78), respectively, and each of said answers of interveners adopted the answer of defendants above named, with the exception that intervener Parr-Richmond Terminal Corporation admitted and alleged that it is in competition with other terminals located at other ports on the Pacific Coast and does not admit the reasonableness or validity of the order of the United States Maritime Commission under review in the proceeding with respect to any application of said order not therein under review.

Without going into unnecessary details as to the allegations, admissions and denials of these pleadings appellants here state that it appears therein and therefrom that issue was therein and thereby made and joined, and was made and joined at the trial of said cause in the United States District Court on all of the matters contained in its findings of facts and conclusions of law which are assigned as errors upon this appeal and urged and contained in the statement of points upon which appellants

intend to rely on this appeal and which are specified in Division IV of this brief.

A similar petition and bill for injunction was filed in the United States District Court on October 21, 1941, by the City of Oakland, acting by and through its Board of Port Commissioners (R. 51-62). This action, numbered 22002-R in the District Court, was consolidated for trial with the action instituted by appellants, numbered 22000-R in the District Court (R. 63-66).

The two actions came on for trial on February 26, 1942, at which time evidence was offered by the petitioners in both cases, and received, as follows:

Petitioners' Exhibit No. 1, consisting of certified copies of orders and similar papers re Docket No. 555 before the United States Maritime Commission (R. 79-80).

Petitioners' Exhibit No. 2, consisting of a certified copy of 1904 pages of testimony taken in the proceedings in Docket No. 555 before the United States Maritime Commission (R. 80).

Petitioners Exhibit No. 3, consisting of duplicate copies of one hundred seventy-two (172) original exhibits introduced at the hearings in Docket No. 555 before the United States Maritime Commission, which said duplicate copies of exhibits were substituted for the original exhibits by order of the statutory three-judge court (R. 80).

Briefs were filed, and the two causes orally argued on May 21, 1942; the two causes were then sub-

mitted to the Court for consideration and decision (R. 80-81).

The Court filed its Opinion in the two causes on August 20, 1942 (R. 82-92), and made and filed its findings of fact and conclusions of law in the two causes, on November 16, 1942 (R. 103-110).

Separate final decrees were entered in the two causes, the final decree from which this appeal is taken being made, filed and entered on December 1, 1942 (R. 108-109). An appeal has also been taken in *City of Oakland, etc.* v. *United States of America, et al.*, October Term, 1943.

A Joint Transcript of Record has been prepared and printed under the direction of the Clerk for use in both of said appeals.

FACTS

The following facts have been established without contradiction by the evidence introduced at the trial:

Facilities and charges of appellants

The Board of State Harbor Commissioners for San Francisco Harbor is a governmental agency of the State of California. Said Board, hereinafter referred to as "the Board," is a public body. The members thereof are appointed by the Governor of the State of California. The Board was created under the statutes of the State of California in 1863 and controls the activities of the San Francisco waterfront (R. 141).

The accounting system used by the Board is subject to the control of the State Department of Finance. Matters involving legal interpretations of the Harbors and Navigation Code, regulating the Board in its activities, are referred to the Attorney General of the State of California (R. 484).

The functions of the Board are to provide facilities for the handling of freight and passengers on the San Francisco waterfront. The Board controls all of the commercial waterfront of San Francisco (R. 141). The Board is not regulated by the Railroad Commission of the State of California, nor is the tariff of the Board filed with said Commission (R. 141).

All of the piers built on the San Francisco waterfront have been built by the State of California out of the San Francisco Harbor Improvement Fund or out of Harbor Bond Funds. All of these piers are built out over the submerged tidal waters of San Francisco Bay, or on reclaimed land, and all of them are located on State property owned by the State of California. Previous to the filling in of these tidelands, the lands were covered by tidal waters. All of the reclaimed land has been filled in by the State of California. A seawall was built along the whole course of The Embarcadero. The lands beyond this seawall and adjoining the shore were filled in to constitute The Embarcadero. All of this land was owned by the State of California at the time it was filled in. In fact all of these lands, including

the filled in land and the land which was reclaimed, have been owned by the State since the time of its admission into the Union.

The Board assigns pier space to the various steamship lines on the San Francisco waterfront. These assignments give the steamship companies a preferential use of certain pier space subject to cancellation upon thirty days' notice (R. 141). The Board charges rental for the use of the pier space based upon a square foot basis. The Board also collects dockage charges on the vessel, toll charges on the merchandise moving over the piers, and it collects a demurrage charge on cargo remaining on the piers beyond the free time. These charges are established by the Board and are published in its tariff (R. 141-142).

The Board does not engage in the business of a warehouseman. It is forbidden by law to do so (R. 149).

The demurrage charges applied on the transit piers used for transit operations are high enough to be in effect a penalty charge (R. 150-151). The penalty rate for wharf demurrage assessed by the Board on in-transit operations is a charge which makes it uneconomical for the shipper to leave the cargo on the piers. The purpose of this penalty rate is to clear the transit sheds (R. 452). This penalty basis for wharf demurrage, as well as the bulkhead basis for wharf demurrage, applies to all of the assigned piers (R. 452). The demurrage

charges assessed by the Board in connection with the provisions in the tariff regulating free time, effectively move the cargo off the docks and keep the docks clear (R. 468-469).

The Board does not follow the policy of prescribing daily rates for demurrage storage because of the manner of administration and the expense of keeping books every day. The rate over a period of time will work out just about the same on a monthly basis—by a regular shipper—as it will on a daily basis. It has been the position of the Board of State Harbor Commissioners that with the single exception of outbound cargo which remains on assigned space longer than the free time, all other charges for wharf demurrage, whether penalty basis, bulkhead basis or terminal basis, should be on a period basis (R. 457-458). The charges of the Board, as contained in the tariff, are assessed uniformly at all times. The accounts are audited by the State Department of Finance, and in a recent check-up of demurrage charges the Board was told that the charges had been assessed one hundred per cent (R. 484). Demurrage charges of the Board have never been waived (R. 458, 483, 469, 511). The Board, in connection with any wharf demurrage or bulkhead storage, does not issue any kind of a receipt that is used as collateral for bank loans (R. 467).

On docks other than Piers 45 and 56, where the Board sometimes has storage or bulkhead storage,

the Board does not perform any of the labor in connection therewith. Expenses of handling in connection with wharf demurrage on piers other than 45 and 56 are paid by the assignees of those particular piers. The Board does not on any of the piers or docks do any checking of cargo (R. 476), or do any stapling, stenciling or weighing (R. 477, 478), or do any highpiling or moving of cargo (R. 496), or impose any receiving or delivery charges (R. 510).

Types of demurrage and storage charges made by the Board

On the so called "assigned piers," or piers other than 45 and 56, if the cargo remains longer than the free time the Board applies what is termed "the penalty rate of demurrage", which, as shown by "Exhibit 64a", (p. 18) (appears R. 1082, in evidence R. 651), is as follows: for Coastwise and Inland Water Way Trade Outbound, assembled cargo "2½ cents per ton per day, weight or measurement, which ever will yield the greatest revenue for the first 5 days or part thereof, and 5 cents per ton per day for the next 5 days or part thereof, and 10 cents per ton per day for each succeeding day * * * *."

On Foreign Offshore and Intercoastal Trade, outbound, assembled cargo, the wharf demurrage rate is 2½ cents per ton per day for the first 3 days, 5 cents per ton per day for the next 4 days, and 10 cents per ton for each succeeding day.

On all types of cargo, after free time, on inbound discharged cargo, 25 cents per ton, weight or measurement, whichever will yield the greater revenue, for the first 5 days or part thereof, and 50 cents per ton for each succeeding period of 5 days or part thereof, with the exception of certain specified commodities.

Under certain circumstances, which are provided for in its tariff, pages 19, 20, Exhibit 64a (which appears R. 1083-1084, in evidence R. 651), the Board applies what is commonly known as the "bulkhead rates" which is 12½ cents per ton, weight or measurement, whichever will yield the greater revenue, for each 7 days or part thereof (R. 594). On Piers 45 and 56, occupied by the Golden Gate Terminal Company and the State Terminal Company, Ltd., respectively, another storage rate applied called terminal wharf demurrage but not in regular transit operations. (R. 594)

Charges and activities of terminal operators

The Golden Gate Terminal Company and the State Terminal Company, Ltd., at the time of the hearing were terminal operators holding assignments from the Board (R. 142-143, 594-595). The Golden Gate Terminal Company was located on Pier 45 and the State Terminal Company, Ltd., was located on Pier 56. These companies were not restricted by any conditions imposed by the Board in connection with the license to either of them

that would prohibit them from handling any article of commerce that might move over their terminal properties (R. 467). The Board had complete control of these pier facilities and the terminal companies were simply there to handle such cargo as they might be able to obtain and handle for the shipper (R. 143). They performed these services for themselves and not as agent for the Board (R. 143). They paid no rent to the Board for space in the transit sheds and adjoining spaces, and the charges collected by the Board, viz: dockage, tolls and demurrage were the same as those collected on other piers (R. 144). The Board collected all storage and demurrage charges on these piers (R. 144). The terminal companies collected only for the services they performed (R. 144). The Board collected storage charges for grain at Islais Creek Grain Terminal. This terminal paid the Board rental only for the space used by it for offices and space for cleaning and grading operations (R. 145). Unloading, receiving, weighing, piling, redelivering and reloading grain at this terminal was performed and controlled by the grain terminal (R. 144) and the terminal operator had custody of the grain (R. 146).

The Board makes no handling charges for terminal service (R. 467). No handling operations or services of any kind are performed by employees of the Board (R. 476), or in any manner for the Board (R. 477). The Board assesses no service charge, or receiving or delivery charge (R. 510).

No regulatory body over the Board

The Board does not file its tariff with any regulatory body (R. 471-472). It is the contention of the Board it is not subject to regulation by any regulatory body (R. 471).

The Board does not pay taxes of any kind to anybody (R. 584).

Statutory provisions as to Board action

The Board is controlled, in its action, by the terms of sections 3080 and 3084 of the Harbors and Navigation Code of the State of California in fixing rates, dockage, tolls, wharf rates and other charges (R. 489-490). In fixing rates, dockage, wharfage, tolls, rents, and other charges, the Board is controlled in its action by the terms of section 3080 of the Harbors and Navigation Code of the State of California, which provides that it may collect an amount of revenue therefrom that will enable it to perform the duties required by that part of the Code (R. 489-490).

The Board is also limited by the provisions of section 3084 of the Harbors and Navigation Code of the State of California, which provides that a greater amount of money shall not, in the main, be collected pursuant to Part 1, Division VI of said Code than is necessary to enable the Board to perform the duties required, or to exercise the powers authorized by said Part 1, and to provide for in-

terest and redemption requirements for bonds issued for any of the purposes which said part is intended to promote.

No evidence as to demurrage or storage cost on Board's facilities

No studies have been made by the Board to develop the unit cost of furnishing wharf demurrage based on the Edwards Formula, Case No. 4090, Exhibit 61. The accounting records are not kept in such a way that such studies are possible. The Board has not made any studies to develop the unit cost of furnishing wharf demurrage on the basis of the Edwards Formula and has not made any such studies on any other basis (R. 580). The accounting records of the Board are not kept in such a manner that the costs assignable to wharf demurrage and wharf storage could be allocated to the Edwards Formula (R. 589).

T. G. Differding qualified as a special expert for the Maritime Commission and testified in this proceeding. (R. 237-274, 709-739) The testimony of Mr. Differding was largely, if not entirely, in connection with wharf demurrage and/or wharf storage together with the matter of free time. (R. 244) At pages 61 to 65 of Exhibit No. 60, Preliminary Report in California Railroad Commission Case No. 4090 (appears R. 760. In Evidence R. 242), the matter of wharf demurrage and wharf storage is

treated. Mr. Differding summarized this subject as follows:

All of the general cargo terminal operators in the San Francisco Bay area claimed that the existing charges were unsatisfactory and none were able or even desired to recommend them because of their depressed level. However, the fact is that no changes of any consequence have been made in the rates or charges since 1935 to date, because of certain factors, even though the rendering of the service has become more expensive. (R. 244)

Exhibit No. 61 was received in evidence by the Commission. (Appears R. 871. In evidence R. 245.) The basic theory followed in determining wharf demurrage charges was that those who used the facilities or labor furnished by the terminals should pay for that use regardless of whether the cargo arrived by water, land or truck. Upon following that doctrine through, the conclusions and costs set forth in the final report in California Railroad Commission Case No. 4090 (Exhibit No. 61) were arrived at. (R. 246)

Exhibit No. 61, report of the California Railroad Commission in Case No. 4090, was confined entirely to private terminals. No physical check of the public terminals was made, except of the facilities under assignment by the Board of State Harbor Commissioners, viz., the Golden Gate Terminal and the State Terminal Company, Ltd. However, the matter of wharf demurrage and the incidental

charges in connection with it were entirely under the control of the Board of State Harbor Commissioners and the study in Case No. 4090 went no further than the checking of the facilities under assignment by the Board to the above-named terminals (R. 247). In other words, so far as those two facilities were concerned, the check was confined to "the services rendered other than wharf demurrage or storage matters". No study was made in this case into the wharf demurrage situation at the Port of Oakland or the Port of Stockton (R. 247).

Chapter VIII, pages 93 to 110, inclusive, of Exhibit 61, explains and analyzes wharf demurrage practices and costs as of 1935. There is little change in the practices or rates up to the present time. There is no question, however, that all of the major elements of costs enfering into the providing of this service, have very materially increased since 1935, the only exception appearing to be carrying charges on the structures and land (R. 248).

Some of the suggested changes ordered by the California Railroad Commission in Case No. 4090, Exhibit No. 61, were put into effect at the private terminals in the San Francisco Bay area, but not at the public terminals (R. 262).

IV

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED BY THESE APPELLANTS ON THIS APPEAL

On this appeal, appellants herein, State of California and Board of State Harbor Commissioners for San Francisco Harbor, intend to urge and rely upon the following errors, heretofore assigned herein (the word "petitioners," as used in the assignment of Errors, refers to appellants above named):

1. The Court erred in making and entering its final decree denying the permanent injunction applied and prayed for by petitioners and appellants above named, and in dismissing the proceedings in said case.

2. The Court erred in refusing to make and enter its decree vacating and annulling and permanently enjoining the order of the United States Maritime Commission issued and made on September 11, 1941.

3. The Court erred in finding and concluding that each of said petitioners and appellants is an "other person subject to this Act" as defined in the Shipping Act, 1916, as amended.

4. The Court erred in finding and concluding that said petitioners and appellants and each of them is subject to the power of Congress to regulate interstate and foreign commerce (Const., Art. 1, Sec. 8, Cl. 3) in respect to the activities affected by the order of the Commission.

5. The Court erred in finding and concluding that said petitioners and appellants and each of them is subject to the jurisdiction of the United States Maritime Commission under the Shipping Act of 1916, as amended, in respect of the activities affected by the order of the said Commission of September 11, 1941.

7. The Court erred in finding and concluding that the said order of the United States Maritime Commission in the proceeding in which it was made and issued was sustained by the findings of the said Commission and by the evidence of record before the said Commission in said proceeding.

8. The Court erred in finding that the rules, regulations and practices of said petitioners and appellants, and each of them, with respect to free time, are, insofar as they permit free time allowance greater than those set forth in its findings, exclusive of Sundays and holidays, unduly preferential and prejudicial within the meaning of Section 16 of the Shipping Act, 1916, as amended, and unreasonable regulations and practices within the meaning of Section 17 of that Act.

10. The Court erred in finding that the rates of said petitioners and appellants for wharf demurrage and wharf storage services, at the time referred to in said proceedings before the Commission, were producing revenues which are substantially less than the cost of the service, and are not compensatory.

11. The Court erred in finding that the granting of wharf storage or wharf demurrage services at non-compensatory rates is unduly preferential and prejudicial within the meaning of Section 16 of the Shipping Act of 1916, as amended, and an unreasonable practice within the meaning of Section 17 of that Act.

12. The Court erred in finding and concluding that said Commission had lawful authority to issue its said order in the proceeding before it in Docket 555 and that said order is valid and lawful in all respects.

13. The Court erred in not finding and concluding that the Shipping Act of 1916, as amended, does not by its terms purport to apply and does not apply to petitioner and appellant State of California or to petitioner and appellant Board of State Harbor Commissioners for San Francisco Harbor.

14. The Court erred in not finding that at all times mentioned in said petition and in the proceedings before the said Commission, petitioner and appellant State of California, acting by and through petitioner and appellant Harbor Board, in the construction, maintenance and administration of San Francisco Harbor, was engaged and now is engaged in the performance of purely governmental functions and at all of said times was not and now is not engaged in any kind of business whatsoever, and there was no evidence to the contrary at the hearing in said proceeding before the Commission.

15. The Court erred in not finding that there was no evidence at said hearing before the Commission that either of the above named petitioners and appellants was at any of the times mentioned or inquired into at said hearing or is now carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water, or otherwise, or that either of said petitioners and appellants was at any of said times or now is carrying on any business whatsoever.

These are the same errors as those specified in Appellants' Statement of Points upon which appellants intend to rely on appeal (R. 1310), although stated in a different order, the omitted assigned errors numbered 6 and 9, not being included in said last named statement.

V

SUMMARY OF ARGUMENT

Point 1. All of the facilities on the San Francisco Waterfront are state owned, and constructed on State owned sovereign lands, either submerged or reclaimed. The Board of State Harbor Commissioners, an agency of the State of California, manages and controls all of the Harbor property, and collects all port charges, including demurrage and storage charges. The Board is limited by the State law in its charges to an amount sufficient to pay

its expenses. The powers of the Board are governmental in character, and the Courts have so held.

United States Supreme Court decisions are to the effect that the regulation of the rates and charges of such a port is a matter of local and not national concern. Any statements in these cases as to the power of Congress to regulate such matters are but dicta. Wharves are in the same category as public streets, and not subject to the control of Congress under the commerce power, or otherwise. Orders such as the order of the United States Maritime Commission of September 11, 1941, are an unwarranted interference with the fiscal affairs of the State, and not authorized by the power of Congress to regulate interstate or foreign commerce.

Point 2. Neither of the appellants is included within the term "person" or within the phrase "other persons subject to this Act" within the meaning of Section 1 of Shipping Act, 1916, as amended. The meaning of the term "include" depends upon intent. The general rule is that a statute does not apply to a sovereign State unless the State is mentioned therein. States are not mentioned in the Act. The history of the legislation resulting in the enactment of the Shipping Act, 1916, as amended, evidences an intent upon the part of Congress that the Act should not apply to a State. The legislative history and provisions of other statutes in pari materia with the Shipping Act, 1916, as amended, indicate the same intent. The language used in

said Act when analyzed and compared with similar provisions of other Congressional Acts is likewise a strong indication of such intent.

The long period during which the United States Maritime Commission and its predecessor officers and boards did not attempt to regulate public bodies under the Act is an indication that they did not believe that it applied to a State or its political subdivisions.

Another reason why the Act does not apply to either of appellants is that neither of them is engaged in the business of furnishing wharves or docks or other facilities in connection with a common carrier by water, or any business whatsoever.

United States v. *California*, 297 U. S. 175, 80 L. Ed. 567, 56 S. Ct. 421, is not authority for the proposition that the Act applies to appellants or either of them.

Point 3. The United Maritime Commission has no jurisdiction over wharf demurrage or storage rates. The provisions of the Shipping Act, 1916, as amended, grants no power to the Commission over such rates. That Act gives very limited power to the Commission over rates, and no power to fix minimum rates for wharf storage or demurrage. The case of *Baltimore and Ohio R. R. Co.* et al., v. *United States* et al., 305 U. S. 507, 83 L. Ed. 318, 59 S. Ct. 284, is so different, in its factual situation, from the instant case and construes an Act so different from the Shipping Act, that it is not au-

thority in support of the theory that the Commission has authority to establish such minimum rates. The attempt of the Commission to do so is not justifiable as a condemnation of a practice in violation of Sections 16 and 17 of the Shipping Act, unless the revenue from such rates is less than out-of-pocket costs. No such showing as to out-of-pocket costs has been made in this case.

Point 4. The finding of the trial court that the appellants' wharf demurrage and storage rates were producing revenue substantially less than the cost of the service and therefore not compensatory is without evidentiary support. No evidence was produced at the hearing as to such cost, or as to whether any loss that might have resulted from such rates was substantial. No substantial loss could result from these rates and no discrimination between shippers could result unless the out-of-pocket expenses of appellants exceeded the revenues from the services. There is no evidence in the record as to such expenses or whether they exceeded such revenues.

Point 5. The United States Maritime Commission has no jurisdiction or power over wharf storage or wharf demurrage, because no such power is given to it by the Shipping Act, 1916, as amended. This is so because such services are not furnished by parties, who own, conduct or administer wharves, "in connection with a common carrier by water". Such services are furnished independently of the

carrier, who has no interest in it whatsoever and these services are not a part of transportation.

Point 6. The part of the Order of September 11, 1941, relating to free time allowances, so far as it relates to these appellants, has no support in the evidence taken at the trail.

VI

ARGUMENT

Point 1. Neither the State of California nor the Board of State Harbor Commissioners for San Francisco Harbor, Appellants Herein, is Subject to the Power of Congress to Regulate Interstate and Foreign Commerce in Respect to the Activities Affected by the Order of the Commission of September 11, 1941.

The order of the U. S. Maritime Commission made on September 11, 1941, among other things: (1) commanded these appellants together with other respondents in the proceeding before it in Docket 555 to cease and desist and abstain from allowing greater periods of free time than the periods set out in Table 1 of its report; (2) ordered said parties thereafter to abstain from publishing, demanding or collecting wharf demurrage or wharf storage rates which shall be less than the minimum rates found reasonable in its finding No. 7 specifying the rates; and, (3) required said parties to file with the Commission and keep open to public inspection schedules showing all the rates and charges for the furnishing of wharfage, dock, warehouse, or

other terminal facilities in connection with a common carrier by water. (R. 44, 45.)

In the words of the opinion of the trial court, (R. 89), "The Commission disavows authority to fix the rates of petitioners. What it does lay claim to is the authority and responsibility of preventing discriminatory and unreasonable practices * * *."

All of this, the Commission claimed and claims it had authority to do under and by virtue of Sections 16 and 17 of the Shipping Act, 1916, as amended, on the basis of findings that the free time, rules, regulations, and practices of the said parties are unduly prejudicial and preferential in violation of Section 16 and unreasonable in violation of Section 17 of said Act, and that the rates, rules, regulation, and practices of said parties relating to wharf demurrage and wharf storage are unduly prejudicial and preferential in violation of Section 16, and unreasonable in violation of Section 17 of the Shipping Act, 1916, as amended.

Presumably, though not stated in the findings, the Commission based its order as to notification, filing, etc., of schedules on Section 21 of the Act.

It is the position of these appellants that Congress had and has no power under the commerce clause of the Constitution of the United States, or otherwise, to authorize the Commission to make such orders. Before entering upon a discussion of the reasons for this conclusion, at the risk of some repetition,

we here set out the factual situation as to the administration of San Francisco Harbor:

Ownership of land and facilities

All of the piers and other facilities constructed on the San Francisco waterfront have been built by the Board, for the State of California, out of San Francisco Harbor Improvement Fund or out of Harbor bonded funds. Bonded indebtedness for the work of the Board is incurred through general obligation bonds of the State of California approved by the voters of the State. (R. 598-599.)

All of these facilities are built out over the submerged tidelands of San Francisco Bay, or on reclaimed land, and all of them are located on State property owned by the State of California. Previous to the filling in of these tidelands, the lands were covered by tidal waters and were and are now all owned by the State of California. In fact, all of these lands, including the filled land and the land which was reclaimed, have been owned by the State of California since the time of its admission into the Union. (R. 598-599.)

Manner in which the property of the State is used

The Board of State Harbor Commissioners, hereafter called "the Board" is an agency of the State of California. (Harbors & Navigation Code hereinafter called "H & N Code", Section 1700) (R. 141.)

The Board constructs and/or maintains all port facilities by assessment of charges against those who use them. The facilities are used in the following manner:

The Board assigns piers and wharves to the various steamship lines on the San Francisco Waterfront. (Sec. 3061, H & N Code.) These assignments give the steamship companies preferential rights for the use of the pier or piers or facilities assigned to them, subject to thirty (30) days cancellation notice. (H & N Code, Sec. 3063.) The Board also charges a dockage against vessels and makes toll charges against merchandise (cargo) moved over the piers (Sec. 3080, H & N Code), and the Board collects demurrage charges on cargo remaining on the transit piers beyond the prescribed free time (Sec. 3087, H & N Code); all of these charges are determined by the Board, published in its tariff, and assessed to all users alike for similar services. (R. 141-142.)

The Board is limited in its charges by the provisions of Section 3084, H & N Code, which provides that a greater amount of money shall not, in the main, be collected than is necessary to enable the Board to perform the duties required. These duties consist of doing construction work, financed principally from proceeds from the sale of bonds, the principal and interest of which are payable out of Harbor income; maintaining facilities and gen-

erally administering the work and affairs of the Harbor. (R. 489-490.)

The Board does not assess handling charges for terminal services. (R. 467.) No handling operations or services of any kind are performed over the wharves by employees of the Board. (R. 476.) The Board furnishes no stevedores, loaders or unloaders. (R. 477.) The Board does no stapling, stenciling or weighing of cargo. (R. 477-478.) Handling services are never performed on the wharves by the Board. (R. 496.) The Board performs no high piling services nor moving of cargo from one part of the pier to another. (R. 496.) The Board assesses no service charge or receiving or delivery charge on cargo moving over the wharves. (R. 510.)

The status of the State in so administering these properties is that of an owner furnishing facilities alongside of which vessels may moor and upon which property may be deposited by carriers, shippers and consignees, and over which property may be moved and persons may pass for the purpose of loading vessels and for the purpose of discharging upon such facilities goods which are to be delivered to consignees.

The rates of docking of ships at these facilities and for using the facilities for the placing of goods thereon, and allowing them to remain thereon for certain periods of time, are fixed by the State acting by and through the Board.

All of these facilities are located and all of these functions are performed by the State within its own borders.

The powers and duties of the Board are governmental in character

The Board has powers relating to building a seawall and dredge (H & N Code, Sec. 3005); providing Harbor police and making quarantine regulations (H & N Code, Secs. 3204 and 3226); extending streets and establishing thoroughfares (H & N Code, Secs. 3130-3138); exercising the power of eminent domain (H & N Code, Secs. 3135-3136); locating and constructing public dry docks (H & N Code, Sec. 1909); locating docks for Federal use (H & N Code, Sec. 3052); operating a state belt railroad (H & N Code, Sec. 3150); providing a location for air ports (H & N Code, Sec. 1944), and making rules and regulations to control the same (H & N Code, Sec. 1945); contracting for and using fire boats (H & N Code, Secs. 3105 and 3201); mapping waterfront changes (H & N Code, Sec. 1782); making rules and regulations for the commerce of the port. (H & N Code, Secs. 1900 and 1907.)

Other indicia of the governmental character of the Board vested in it by the Harbors & Navigation Code and other statutes are the following:

The Board is required to render a biennial report to the Governor of the State (H & N Code, Sec. 1708); it has the power of appointment of officers

and employees of the State (H & N Code, Sec. 1732); it has possession and control over the area of the Port of San Francisco, owned by the State (H & N Code, Sec. 1770); officers and employees of the Board are members of the State Civil Service System (Constitution of California, Art. XXIV; State Civil Service Act, Cal. Stat. 1937, Ch. 753) and of the Employees' Retirement System of the State of California (State Employees' Retirement Act, Cal. Stat. 1931, Ch. 700, as amended); the revenues of the Board must be deposited monthly in the State Treasury and are subject to budgetary laws, and must be used pursuant to legislative appropriation (H & N Code, Sec. 1706); contracts of the Board must be made in a manner prescribed by law (H & N Code, Sec. 1990); failure to comply with certain rules and regulations of the Board or to place obstructions in the bay without its consent are misdemeanors (H & N Code, Secs. 3200 and 3201); bonded indebtedness for the work of the Board is incurred through general obligation bonds of the State of California. (Stat. 1905, Ch. 522; Stat. 1909, Ch. 1713; Stat. 1913, Chap. 1122; Stat. 1929, Ch. 1776.)

The question of the capacity in which a State acts in constructing, maintaining and operating a port was involved in *Commissioner* v. *Ten Eyck*, 76 Fed. (2d) 515 (C. C. A. 2d). While this case involved the question of liability of an officer of the State for the payment of Federal income tax and has

since been overruled on this point, nevertheless the fundamental question upon which the officer resisted the right of the Federal government to collect the tax was that the State, in building, operating and maintaining the Port of Albany in the State of New York, was engaged in the performance of a usual, traditional and essential governmental function. In order to determine this issue the Court reviewed at length the laws and practices prevalent in European countries and in countries of this continent over a period of hundreds of years with respect to the building and operating of harbors and concluded:

"Port and harbor developments have long been regarded as governmental functions in providing for the welfare and prosperity of the people * * * Historically, port activities have been shown to be almost universally directly subject to the supervision of agencies of the government."

"It did operate the railroad, and charged rates authorized by the Interstate Commerce Commission. But we think that this terminal was intended as an *instrument of government rather than of commerce only.* In providing it and operating it, the state of New York was engaged in a usual governmental function as distinguished from a proprietary function." (Emphasis added.)

This case was not appealed by the Government of the United States and the position which the Court

took in regard to the character in which the State acted has not been modified by any Court decision.

The laws governing the creation and government of the Albany Port District were very similar to the statutes of California relating to the conduct and government of the Harbor of San Francisco.

In *Denning* v. *State*, 123 Cal. 316, 55 Pac. 1000, the Supreme Court of California said at pages 321 and 322:

> "The provisions of the constitution clearly show that the State has retained control of the harbor and frontages thereon for the use and benefit of the people, for the promotion of commerce and the general benefit of the body politic, and not as a mere business enterprise through which profits may accrue to the state treasury; and the statute creating the state board of harbor commissioners is intended and adapted to the execution of this purpose * * * But the powers and duties of the board are diversified. It has control of the bay and of the vessels using it; keeping open passageways for the ferry boats; controlling the anchorage of vessels; removing vessels from the wharves and piers when unloaded, and the general care of all the property belonging to the State and connected with the wharves and piers, or used by said board. These duties are of a police character and *purely governmental*.
>
> "The fact that the board is authorized or required to collect tolls and charges for dockage and wharfage to such extent 'as will enable the commissioners to discharge the duties required

of them by the act' *does not affect its character as a governmental agency.*"

The Supreme Court of the United States in *Sherman* v. *United States,* 282 U. S. 25, 75 L. Ed. 143, 51 S. Ct. 41, considered the capacity in which the State of California acts in operating the State Belt Railroad and expressed itself as follows:

> "The matters complained of occurred upon what is known as the State Belt Railroad. The road is about five miles long, within the City of San Francisco, runs nearly parallel with the waterfront of the harbor, and connects many industrial plants and the line of the Southern Pacific Company with wharves belonging to the State and through the wharves with other common carriers engaged in interstate commerce by railroad. It may be assumed that the work done upon the Belt Line was interstate commerce. *But the line belongs to and is operated by the State; the work is done without profit for the purpose of facilitating the commerce of the port, and the funds received after paying expenses go to the Treasury of the State to the credit of the San Francisco Harbor Improvement Fund. California has not gone into business generally as a common carrier but simply has constructed the Belt Line as an incident of its control of the Harbor—a State prerogative.*" (Emphasis added.)

It was specifically held in *Platt* v. *Commissioner,* 35 B. T. A. 472 (1937), that the Board of State Harbor Commissioners of California is engaged in the performance of a usual governmental function.

In *State of California* v. *Anglim*, 37 Fed. Supp. 663, decided in the United States District Court (Northern District of California) on March 6, 1941, the question of the capacity in which the Board is acting was directly involved. The Court expressed itself on the matter as follows:

> "In its operation and maintenance of the Port, the Board performs many functions governmental in nature. It maintains harbor police, fireboats, thoroughfare, public dry docks, aids to navigation; it cares for the removal of obstructions to commerce and navigation. * * * In its scope and effect, port and harbor development, designed to facilitate the flow of commerce, *cannot properly be classified as commerce itself*, normally conducted by *private industry*. The importance to the general welfare, the public at large, of adequate ports and harbors for the stimulation of navigation and commerce; the fact that the development of ports and harbors has not occurred at the hands of private industry, but has remained in the reigns of government as a recognized sovereign right and duty, *these considerations, in the opinion of this court, have rightfully marked the operation of ports and harbors a proper function of government. Denning* v. *State of California*, 123 Cal. 316, 55 P. 1000; *Commissioner of Internal Revenue* v. *Ten Eyck*, 2 Cir. 76 F (2d) 515." (Emphasis added.)

This holding was in no way modified on the appeal of this case. (129 Fed. (2d) 455)

There are a number of cases decided by the United States Supreme Court relating to the powers of States and municipalities, to construct, maintain and administer wharves and other improvements made at State expense used by vessels engaged in interstate commerce. Among these are:

Parkersburg v. *Ohio River Trans. Co.*, 107 U. S. 691, 27 L. Ed. 584, 2 S. Ct. 732;

Ouachita & M River Packet Co. v. *Aiken*, 121 U. S. 444, 30 L. Ed. 976, 7 S. Ct. 907;

Northwestern Union Packet Co. v. *St. Louis*, 100 U. S. 423, 25 L. Ed. 688;

Cincinnati, etc. Packet Co. v. *Catlettsburg*, 105 U. S. 559, 26 L. Ed. 1169;

Packet Co. v. *Keokuk*, 95 U. S. 80, 88, 24 L. Ed. 377;

Sands v. *Manistee River Improvement Co.*, 123 U. S. 288, 31 L. Ed. 149; 8 S. Ct. 113.

All of these cases with the exception of the one last named, dealt with the power of a State or a municipality, authorized thereto by State law, to construct, maintain and administer wharves and other port facilities used by vessels engaged in Interstate Commerce, and to make reasonable charges for such uses. The Supreme Court in these cases has uniformly held that the State has the power to engage in these activities.

In none of these cases was there an issue as to whether the power of the State to engage in such activities was subject to the overriding power of Congress, for it did not appear in any of them that

Congress had undertaken to regulate the charges which were in dispute. It is true that in making these various decisions that the State had the powers above mentioned, the Court did, in some of these cases, by way of dictum only, state that the powers of the States which were under consideration, were being exercised in the absence of Congressional legislation on the subject, but such statements were unnecessary to the decisions made in any of these cases.

On the other hand, there are strong intimations in several of these decisions that the matter of constructing, maintaining and administering wharves used by vessels engaged in Interstate Commerce, is a matter of local concern, and subject to local laws and regulation. Indeed, in *Packet Co.* v. *Keokuk, supra,* where the city of Keokuk had established wharves, under the authority of the State law and its charter, and made charges for the mooring of vessels at such wharves and the use of the wharves, it was held that the charges made by the State were proper charges and the Court in the course of its decision said, with respect to the making of such charges: *"It is in no sense a regulation of Commerce between the States."*

In *Cincinnati, etc. Packet Co.* v. *Catlettsburg, supra,* and in *Parkersburg* v. *Ohio River Transportation Co., supra,* the Court stated that the use of public wharves does not belong to that class of subjects which are in their nature national, requiring a

single uniform rule, but to that class which are in their nature local requiring a diversity of rules and regulations.

We submit that it is a fair resume of the holdings of these cases, to say that in none of them was the issue as to the power of Congress to exercise supervision or control over State or municipal management and use of wharves and charges for such use, presented to the Court for decision. After a thorough research, we have found no case holding that Congress has such power but on the contrary, as we have noted, there are strong expressions in many of the cases to the effect that such matters are of local concern, and within the exclusive powers of the States.

In *Clark* v. *McCarthy,* 1 Cal. 453, 454, it was held that a wharf in its nature is of the same character as a public street.

Section 3138 of the H & N Code provides that the Board of State Harbor Commissioners may use any portion of the streets of San Francisco ending on the waters of the Bay, for loading and landing merchandise with the right to collect dockage, tolls, etc.

Highways, wharves and ferries are considered in law as of the same general nature and are all proper subjects of State regulation.

People v. *San Francisco & Alameda R. R. Co.,* 35 Cal. 606;

Gibbons v. *Ogden,* 9 Wheat. 1, 73, 203, 6 L. Ed. 23.

In *Gibbons* v. *Ogden, supra,* the Court said:

> "That inspection laws may have a remote or considerable influence on commerce will not be denied; but that power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted * * *. These form a portion of that immense mass of legislation which embraces everything within the territory of a state *not surrendered to the general government;* all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as the laws regulating the internal commerce of the states, and those which respect *turnpike roads, ferries,* etc., are component parts of this mass.
>
> "No direct general power over these objects is granted to Congress; * * *. (Emphasis added.)

The situation presented in this case is that of a sovereign State of the United States owning certain facilities located entirely within its borders, and in the course of its administration of them making and collecting certain charges for the use thereof, its activities in this regard being of a governmental character and all carried on by a regularly constituted agency, and regularly appointed officers of the State, and in furtherance of statutory provisions having for their purpose the promotion of the flow of commerce through the portion of San Francisco under an avowed policy of paying the expense of the exercise of such functions without a single cent of profit accruing to the State.

The activities of the State, therefore, are not of a commercial character, the purpose of all the activities being to promote the public good.

In these respects the position of the State, so far as it bears upon foreign or interstate commerce is quite different from the position of a private owner and operator of a port conducting the same for gain. It is also different from the position of many municipalities operating ports, in that it has not for its object the building up of industries in a particular locality, but rather has for its purpose the general good of all of the people of the State.

We direct the attention of the Court to that portion of the Order of the Commission of September 11, 1941, which deals with the matter of wharf demurrage and storage rates. Among other provisions of this portion of the Order, is the prescription of:

> "the handling charges appearing in column 4 of the Appendix hereto to be charged when cargo goes into storage". (R. 44-45)

Turning to the Appendix (R. 42-43), we find in column 4 thereof a complete schedule of handling charges for differing commodities, varying from 15 cents to 50 cents per ton. This schedule also provides for daily rates instead of period rates.

The order prescribes not only minimum rates but a method of applying the rates which requires an entire change in the manner in which the Board of State Harbor Commissioners for San Francisco

Harbor has been conducting the business of the harbor. As shown in our Statement of Facts, the Board does not prescribe daily rates for wharf demurrage or storage but assesses all such charges on a period basis (R. 457-458). No handling operations of any kind are ever performed by the Board or its employees (R. 476-477), and the Board never makes any charges for handling services.

This order is a splendid example of an attempt to regulate a State in the performance of an acknowledged governmental function. It is nothing less than an interference with the State's plan for the handling of its fiscal affairs,—a meddling not contemplated by the Federal Constitution.

Article IV, Section 4 of the Constitution of the United States provides:

> "The United States shall guarantee to every State in the Union a Republican form of Government".

What becomes of this guarantee if the Congress may dictate to a State the manner in which its officers shall perform its functions?

Under this guarantee can the Federal government force a State to give to anyone a particular service, or, if not, may it force a State to charge anyone for a service it does not perform?

To state these questions is to answer them. The framers of the Federal Constitution never contemplated such interference with State functions.

In *United States* v. *California*, 297 U. S. 175, 80 L. Ed. 567, the Court was dealing with the use of proper safety appliances in the operation of a railroad by a state. It was concerned with an activity usually carried on by private enterprise. In this respect the case was similar to *South Carolina* v. *United States*, 199 U. S. 437; 50 L. Ed. 261, where the Court considered the power of the national government to tax the liquor business conducted by the State. In that case, while acknowledging that a State may engage in the liquor business, the Court concluded that it was not the intention of the framers of the Constitution that a State, in carrying on such a business, should be immune from the taxing power of the Federal Government. That the Federal Government has no power to tax a State in the exercise of a usual, traditional and essential governmental function is implicit in the decision.

By a similar course of reasoning, the conclusion follows inevitably that a State function which at the time of the adoption of the Federal Constitution, was generally recognized as a usual, traditional and essential governmental function, cannot be hindered or crippled by the exercise of the commerce power of the United States. That the construction, maintenance and administration of ports by States and other governmental agencies, was such a State function at the time the Constitution was adopted, was demonstrated to the satisfaction of the Court in

Commissioner v. *Ten Eyck*, supra, where the Court said:

> "Historically, port activities have been shown to be almost universally directly subject to the supervision of the agencies of government."

Another reason why the case of *United States* v. *California*, supra, should be closely limited in its application to attempts of the Federal Government to cripple a State or a State agency in its proper functioning, is that the Court, in that case, was dealing with a police regulation having for its purpose, the protection of the health and lives of railroad employes and the general public. No such consideration enters into the question of regulation of the building and maintenance of ports or of port charges.

We submit that any attempt on the part of the Federal Government to dictate the manner in which a State shall perform a recognized governmental function, to wit, the administering of a wharf or pier which does not include or comprehend the moving by the State of any property or passengers over the same, or the furnishing of any services in connection with such movement, would be a curtailment of a recognized governmental function of the State and would be an unwarranted extension of Federal power. The effect of such action would be to strike down an activity of the State and impair the functioning of the State in its fullest

efficiency. Such action is not within any power granted to the Federal Government.

Point 2. The Shipping Act of 1916, as Amended, Does Not Purport to Apply and Does Not Apply to Either of These Appellants, State of California or Board of State Harbor Commissioners for San Francisco Harbor in Respect to the Activities Affected by the Order of the United States Maritime Commission of September 11, 1941, or Otherwise

The order of the United States Maritime Commission of September 11, 1941 (R. 44), which the above named appellants seek in this action to have enjoined, set aside, annulled and suspended, purports to have been made pursuant to the provisions of the Shipping Act, 1916 (39 Stat. 728, 46 U. S. Code, Sec. 801), as amended. If the order was not authorized by that Act, it is wholly unauthorized, void and of no effect.

The orders of November 30, 1939 (R. 127-128), and February 3, 1940 (R. 128-129) of the United States Maritime Commission making the Board of State Harbor Commissioners for San Francisco Harbor and the State of California respondents in the proceeding before the Commission, designated as Docket No. 555, alleged that said respondents "carry on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with common carriers by water, and therefore are 'other persons subject to this act'

as defined in section 1 of the Shipping Act of 1916, as amended".

The said Act purports by its terms only to regulate the activities of "common carriers by water" and "other persons subject to this act" as defined in Section 1 of the Act.

As appears from the above mentioned orders, and from the evidence received at the hearing in Docket No. 555 and at the trial in the Court below, there was and is no allegation or claim that either of said appellants was or is subject to the provisions of the Act for any reason other than that it is an "other person subject to this act" as defined in Section 1. It is the contention of the said appellants that

A. Neither of said appellants is included within the term "person" or within the phrase "other persons subject to this Act" within the meaning of Section 1 of the Shipping Act, 1916, as amended.

We quote from said Section 1 as follows:

> "The term 'other persons subject to this act' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."
>
> "The term 'person' includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any state, territory, district, or possession thereof, or of any foreign country."

As stated in

59 C. J. 948, Sec. 568:

"As the *intention* of the legislature, embodied in a statute, is the law, the fundamental rule of construction, *to which all other rules are subordinate*, is that the court shall, *by all aids available*, ascertain and give effect, unless it is in conflict with Constitutional provisions, or is inconsistent with the organic law of the state, to the *intention or purpose* of the legislature as expressed in the statute." (Emphasis added.)

In *United States* v. *Cooper Corporation*, 312 U. S. 600, 604-605, 85 L. Ed. 1071, 61 S. Ct. 742, the Court said:

"Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an *intent* by the use of the term, to bring state or nation within the scope of the law." (Emphasis added.)

In *Georgia* v. *Evans*, 316 U. S. 159, 161, 86 L. Ed. 1346, 82 S. Ct. 972, the Court, in construing Section 7 of the Sherman Act (26 Stat. 209, 210) quotes the above language with approval.

In the absence, therefore, of any direct statement in the law as to whether the term "person" includes the sovereign State of California or its agent, Board

of State Harbor Commissioners for San Francisco Harbor, hereinafter called the "Board," we proceed to examine the statute for the purpose of determining its proper construction in this regard.

As stated in the above quotation from *United States* v. *Cooper Corporation, supra*, statutes employing the phrase "person" are ordinarily construed to exclude a State from the content of that expression.

In the Matter of Will of Fox, 52 N. Y. 530, 535, the Court said:

> "The word 'person', when used in a statute, will, unless the meaning is restricted by the context, be deemed to include corporations. They are artificial persons; bodies politic, possessing some of the attributes of natural persons, and are subject to many of the obligations and duties imposed by law upon individuals. * * * But no authority has been referred to showing that the word person, when used in a statute, may, without further definition, be held to embrace a state or nation."

In the case of

Lowenstein v. *Evans*, 69 Fed. 908,

the Court held that:

> "The act of July 2, 1890 (26 Stat., 209, c. 647), to protect trade and commerce against unlawful restraints and monopolies, is not applicable to the case of a state which, by its laws, assumes an entire monopoly of the traffic in intoxicating liquors. (Act S. C. Jan. 2, 1895)."

the Court further saying:

"* * * nor can it be said that the state is a *person* in the sense of this act."

With respect to the meaning of the word "include", the text of 31 *C. J.* 395 reads as follows:

"*Include.* A word with several common significations. It has at least two shades of meaning. It may apply where that which is affected is the only thing included, and it is also used to express the idea that the thing in question constitutes a part only of the contents of some other thing. *Its meaning is governed by the intention as determined by the context.* According to the context, sometimes the term is used as a word of extension, and not of limitation. The term may be employed as meaning to attain, to comprehend, to comprise as a part, or as something incident, to confine within something, to contain, to embrace, to hold as in an enclosure, to enclose, to involve, to shut up, to take in." (Emphasis added.)

In *People* v. *Fisher*, 261 N. Y. S. 390 (1932), the Court, in reference to the word "include", said:

"The word 'include' has been defined by courts and lexicographers in many ways, and its signification varies according to its peculiar use in a particular statute. * * * In determining which shade of meaning to give the word 'include' the intention of the legislature must be gathered from the context and from the statute as a whole, and such interpretation

should be given as is consonant with reason and sound judgment."

It is a well-known canon of statutory construction that a law is never intended to apply to a sovereign unless the sovereign is mentioned therein, particularly if the law tends to restrain or diminish the powers, rights and interests of the sovereign.

Guaranty Title and Trust Co. v. *Title Guarantee Insurance Co.*, 224 U. S. 152, 56 L. Ed. 706; 325 S. Ct. 457;
United States v. *Herron*, 87 U. S. (Wall.) 251, 22 L. Ed. 275;
In re Fowble, 213 Fed. 676;
Dollar Savings Bank v. *United States*, 86 U. S. (Wall.) 227, 239, 22 L. Ed. 80.

In the case of

United States v. *Clausen*, 291 Fed. 231,

there was involved the construction of the Trading With the Enemy Act (40 Stat. 411, as amended: Secs. 1-50, Vol. 50 U. S. C. A.). Said act provided that the District Court was authorized under the act to enforce all orders and decrees relating to the matters provided for therein. The word "person" was defined in Section 2 of said Act as follows:

"The word 'person' as used herein shall be deemed to mean an individual, partnership, association, company or other unincorporated body of individuals, or corporation or body politic."

The question before the Court was whether a State of the United States was included within the above

quoted definition of person and therefore subject to the jurisdiction of the District Court of the United States. In this connection the Court said:

> "The dignified treatment and consideration due a soverign state form no small part of the reason that has actuated the law-making powers in making a state subject alone to the jurisdiction of the Supreme Court. An implied repeal of the law conferring, so far as the courts of the United States are concerned, exclusive jurisdiction on the Supreme Court of suits against a state is not to be sanctioned, in view of the long established recognition of this principle in the history of the doctrine of states' rights."

There has been some indication by text writers and others that the principle that a sovereign is not brought within the terms of a statute, unless named therein, applied only to the enacting sovereign.

We submit, however that the authorities do not justify any such conclusion.

In

United States v. *Hoar*, 26 Fed. Cas. 329, 330,

Mr. Justice Story had before him the question whether the United States are barred of their suit by the statute of limitations of Massachusetts. This was, therefore, a case where the question was whether a statute of the State of Massachusetts applied to the United States, which was not the enacting sovereign, in the absence of any reference to

the United States. In that case, the Court said, in part:

"* * * 'The true reason, indeed, why the law has determined that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right, (though sometimes asserted to be, because the kind is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects, 1 Bl. Com. 247,) is to be found in the great public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable *to all governments*. * * * But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases, the reasoning applicable to them applies with very different, and often contrary force to the government itself.' "

The above excerpt was quoted with approval by Mr. Justice Fuller in

Stanley v. *Schwalby*, 147 U. S. 508, 37 L. Ed. 259, 13 S. Ct. 418.

And in

New York v. *Irving Trust Co.*, 288 U. S. 329, 331, 77 L. Ed. 815, 53 S. Ct. 389,

the Supreme Court said, with respect to Section 57n of the *Bankruptcy Act*, as amended in 1926 (11 U. S. C. A. Sec. 93n):

> "It is admitted here that as the United States *and the states* are not mentioned in the limitation of section 57, they are not bound thereby." (Emphasis added.)

As stated in *United States* v. *Cooper Corporation*, *supra*, the legislative history of a particular statute is recognized by the Courts as an aid in ascertaining the intent and purpose of Congress in enacting the same. Let us then look at the history of the Shipping Act, 1916, as amended.

Prior to the passage of the Act, an investigation was made pursuant to a resolution of February 24, 1912, authorizing the Committee on Merchant Marine and Fisheries of the House of Representatives to study the subject of foreign commerce, particularly as affected by railroad competition. This report is embodied in *H. R. Document No. 805, 63rd Congress, Second Session*, in the prefatory note of which the following statement was made:

> "* * * But it was later deemed expedient to broaden the scope of this resolution so as to

extend the investigating powers of the Committee to every possible transportation agency (such as forwarding dock, terminal and all other companies and firms) which might be connected in any way with foreign or domestic water carriers, or with railroads, and a knowledge of which might be essential in ascertaining the full relationship between the navigation companies themselves as well as between such companies and the railroads * * *."

This was the genesis of the Shipping Act, 1916, as amended.

The conditions referred to in the report as indicative of a need for such legislation are set out, in part, on pages 239-280 thereof.

On pages 242-246, after listing and characterizing certain agreements between railroads and steamship lines serving Boston, the report says:

"Of the foregoing agreements the first two, between the Boston & Maine and Furness Withy & Co., Ltd., and the Dominion Line are substantially the same in all essential particulars. In both instances the steamship lines agree to operate a regular service of prescribed frequency from certain docks of the railroad company, and in soliciting and engaging cargo to give preference, as far as practicable to freight furnished for shipment by the railroad company * * *. The steamship lines are given the exclusive right to use the docks mentioned in the contract * * *, and their steamers must dock only here, or where permitted by the railroad, and 'nowhere else within the port of Boston'."

With respect to the Boston & Maine's agreement with the Hamburg-American Line, as regards service to and from Hamburg, the report said:

"(1) Section 2, providing that railroad company 'agrees not to furnish the use of its wharves and docks to steamers of other parties plying between Boston and Hamburg, excepting therefrom steamers carrying grain only'."

"(2) Section 2 providing that the steamship line agrees during the continuance of the contract that 'all steamers, if any, managed or controlled by it from time to time, and regularly employed in the trade between the ports of Boston and Hamburg shall dock on said mystic wharf, and not elsewhere within the port of Boston'."

"(3) Section 9, providing that 'In the event of ocean competition to the steamship line between Boston and Hamburg being instituted from wharves of other railroads terminating at Boston, the railroad company shall cooperate with the steamship company in meeting such competition.

"(4) The agreement on the part of the railroad company, as expressed in the communication of March 28, 1912, 'not to make a traffic agreement from Boston nor to grant, accommodations at the Boston & Maine's terminals to any other line of steamers between Boston and Hamburg, full cargo of grain excepted * * *.'"

At pages 246-248 are set out agreements with reference to Philadelphia and Baltimore of a somewhat similar character—one steamship company report-

ing that it has "an arrangement for free wharfage with the Philadelphia & Reading Railway Company as respects its Baltimore Service" and that "these contracts are in substantially the same form "as the agreement with the Boston & Maine Railroad Company described in connection with Boston".

At pages 261-264, the report comments on port conditions at Newport News and Norfolk and calls attention to certain agreements between railroads and steamship lines which provide, among other things, that:

> "* * * The railways agree to furnish the Steamship Company at Newport News and Norfolk *free berth room* for their steamers operated under this agreement *and further* agree to accord to the Steamship Company *free wharfage* both inside and outside on all freight handled by Steamship Company under this agreement at the wharves of the railways when such wharfage would otherwise be borne by the Steamship Company."

Speaking more generally on the relation of railroads to port facilities, the report at page 323 said:

> "But even if independent carriers could manage to overcome all other obstacles, the railroads are still in a position to effectively control independent water carriers by refusing to give them the benefit of their dock facilities at Buffalo both for the discharging and receiving of cargo, the independent carriers thus being required, in addition to the other disadvantages already enumerated, to unload at some other dock

and team the goods to or from the railroad station. To make the situation worse, the railroads have secured nearly all the water frontage in Buffalo available for dock purposes * * *."

And on pages 409-412 in a summary of devices for control of competition included, among other things, the following:

"(9) Railroad or steamship company ownership of exclusive terminal facilities. * * *."

* * * * *

"(17) A railroad or its controlled water line or terminal company holds all the available docks and shed and piers and refuses access to an independent line. * * *"

"(18) A railroad or its controlled water line owns the available water frontage which it refuses to utilize, at the same time refusing to release the same by sale or otherwise. * * *."

"(25) Railroads can give access to docks to preferred water lines with which they have special arrangements, thus forcing shippers by other water lines to pay a series of charges for switching, docking and unloading, and putting them to much inconvenience. In effect it means that the shipper who wishes proper service must use the water line preferred by the railroad."

At page 424 of this report we find the one and only recommendation of the Committee as to terminal facilities:

"(10) That railroads be required to make their terminal facilities available to water carriers on equal terms and under such reasonable conditions as the Interstate Commerce Commis-

sion may prescribe. The Committee also believes that the Federal Government should pursue a policy of not expending money in the interest of any port for harbor or channel improvements, unless that port has sufficient dock facilities available to all water carriers."

It is clear from this report that the existing evils disclosed by the investigation consisted in railroad control of docks, wharves, and other terminal facilities, and the preferential use of the same through agreements between the railroads and steamship lines for the purpose of choking competition, and it is equally apparent that the proposed legislation to remedy these evils was to prevent such preferential use.

There was no indication in the Report that publicly-owned and -administered wharves and docks were being used in the manner shown in the report, or that there was any need of regulation of such facilities in order to strike down existing evils.

After the enactment of the Shipping Act, 1916, as amended, Congress, in enacting other statutes relating to ports, expressed itself in a way which indicates strongly that it had never intended by the Shipping Act, 1916, as amended, to regulate public agencies engaged in furnishing port facilities.

On March 2, 1919, Congress passed an Act entitled: "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors and for other pur-

poses." (40 Stat. 1275.) At page 1286 of this statute, there is the following provision:

> "It is hereby declared to be the policy of the Congress that water terminals are essential at all cities and towns located upon harbors or navigable waterways and that at least *one* public terminal should exist, constructed, owned, and *regulated* by the municipality, or *other public agency of the State* and open to the use of all on equal terms, and with the view of carrying out this policy to the fullest possible extent the Secretary of War is hereby vested with the discretion to withhold, unless the public interests would seriously suffer by delay, monies appropriated in this Act for new projects adopted herein, or for the further *improvement of existing projects* if, in his opinion, no water terminals exist adequate for the traffic and *open to all on equal terms,* or unless satisfactory assurances are received that local or other interests will provide such adequate terminal or terminals. The Secretary of War, through the Chief of Engineers, shall give full publicity, as far as may be practicable, to this provision." (Emphasis added.)

In this provision Congress clearly indicates its intent and purpose to encourage the construction, ownership and *regulation* by public agencies of States of port facilities. This expression is wholly inconsistent with the idea that Congress had at a previous time undertaken the regulation of such ports and facilities by any Federal agency. The

only possible inference from this legislative declaration is that Congress at the time was under the impression that it had not previously attempted to regulate States or political subdivisions thereof in regard to the furnishing of wharf facilities.

The intent of Congress in enacting the Shipping Act, 1916, as amended, is further evidenced by later legislation in *pari materia* therewith. It is a well-recognized rule in the construction of a statute that the Court may resort not only to contemporaneous and prior acts of the legislature but also to subsequent acts of the legislature in *pari materia*, for the purpose of ascertaining or discovering the intention or meaning of a former statute.

Board of Commissioners v. *Branaman*, 169 Ind. 80, 82 N. E. 65;
United States v. *Freeman*, 44 U. S. (How.) 556, 14 L. Ed. 724.

We quote from the last cited case as follows:

"The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought to be taken into consideration in construing any one of them, and it is an established rule of law that all acts in *pari materia* are to be taken together as if they were one law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute: that if it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of

its meaning, and will govern the construction of the first statute."

The Transportation Act of 1940 (Public. 785—76th Congress), approved September 18, 1940, amends the Interstate Commerce Act in substantial particulars including the addition thereto of Part III, dealing with the subject of water carriers. Subdivision (a), Section 320 of Part III, repeals the Shipping Act, 1916, as amended, insofar as its provisions are inconsistent with any provision of said Part III, provided that nothing in said Subdivision (a) shall be construed to repeal the provisions of the Shipping Act, 1916, as amended, insofar as such Act provides for the regulation of persons included within the term "other persons subject to this Act" as defined in said Act.

The legislation to add Part III to the Interstate Commerce Act was initiated in *S. 1632*, introduced in Congress in 1935. This bill provided for the regulation of wharfingers as well as water carriers. The wharfingers provisions were later eliminated and the bill was introduced in the next Session as *S. 1400*, which subsequently became Part III of the Transportation Act of 1940.

S. 1632, as originally introduced, defined the term "person" as follows:

> "The term 'person' includes any individual, firm, co-partnership, corporation, company, association, joint stock company or *body politic*." (Emphasis added.)

After the dropping from the proposed legislation of the provisions relating to regulation of wharfingers, the definition of the word "person" in *Section 2* of the *Transportation Act of 1940* read as follows:

> "The term 'person' includes any individual, firm, co-partnership, corporation, company, association, joint stock association, and any trustee, receiver, assignee, or personal representative thereof."

The action of Congress in these successive steps of this legislation is a clear indication that it was not legislating for the purpose of controlling public bodies, otherwise there would be no explanation of the dropping of the expression "body politic" from the definition and such action is a further indication that by the elimination of this phrase it is the intention of Congress that States and their political subdivisions were not to be regulated in this Act.

As a further indication that Congress did not at the time of this legislation regard the word "person" as including a State or agency thereof we refer to Subdivision (1) of Section 13 of Part I of the Transportation Act of 1940, which is the original Interstate Commerce Act, as amended.

This section provides that a petition complaining of acts of any common carrier may be filed with the Interstate Commerce Commission by "any person, firm, corporation, company, or association, or any

mercantile, agricultural, or manufacturing society or other organization, or any *body politic* or *municipal organization,* * * *." (Emphasis added.)

Although other subdivisions of Section 13 were amended at this time, Subdivision (1) was not changed.

Is not the omission to strike the words "body politic" from this section, considered together with the dropping of the same phrase from Section 2 of Part III, a strong indication that Congress did not consider that the word "person" included a "body politic" or a State, or any of its agencies?

On January 21, 1936, the Interstate Commerce Commission transmitted to the President and Congress the Fourth Report of the Coordinator of Transportation, in which the Coordinator said, among other things:

> "The only certain means of correcting these conditions is federal regulation and such regulation is in reality a logical and essential part of federal regulation of water carriage in general. It was for this reason that the provisions for the regulation of 'wharfingers' were included in the original draft of S. 1632 at the last session of Congress. The same purpose can be served, however, by the separate bill now recommended."

Thereafter, the report stated as follows:

> "The separate bill now recommended for the regulation of 'wharfingers' is being prepared after numerous conferences with interested parties. As in the case of the water carrier bill

now before the Senate, the intent is to meet all serious objections which can be met without the sacrifice of principle. The bill will be ready for presentation at an early date."

And afterwards, on March 26, 1936, the Coordinator in a press release said, in part:

"It is also quite generally agreed that legislation for the regulation of wharfingers should be contingent upon legislation for the adequate regulation *of water carriers*, and it still remains for Congress to act upon the latter legislation. In the circumstances, the Coordinator is of the opinion that nothing would be gained by attempting to press the issue of wharfinger regulation at the present session, and will be governed accordingly."

It is a fair inference that at the time of making these statements the Coordinator did not think that there was any statutory provision for the regulation of wharfingers.

We now turn to a consideration of the debate in the House of Representatives during its consideration of the bill which afterwards became the Shipping Act, 1916, as amended. These debates are found in Volume 53 of the Congressional Record, pages 8277 and 8278 thereof, in part, as follows:

Mr. Bennett, a member from New York, offered the following amendment to the above quoted paragraph of the Bill, as follows:

"Page 2, strike out lines 19 to 22, inclusive." (These lines contained the second of the above quoted paragraphs in Section 1 of the Act.)

Thereupon the following remarks were made by members of the House:

"Mr. Bennett. Mr. Chairman, this, of course is covered by decisions and statutes; but there is a distinct danger in attempting to put a definition in the bill where it has already been defined by court decision. I undertake to say that the word 'person' has been defined by the courts in the United States and the several states more than five hundred times. What do you do? If you do not happen to have made as full a definition as some court has, you limit the court. It is useless, simply burdens up the act, and in addition contains a real danger, because, as every lawyer knows, the assertion of one is the exclusion of others; and if for the purposes of this act when used in this act, you have not made the definition as broad as some court has made it, you will simply limit the court.

* * * * * *

"Mr. Hardy. When this question came up, it was asked if there was any statute of the United States defining the word 'person', and, I believe, it was generally conceded that perhaps there were none; and to cover the chance that there might not be such a general definition in the Federal Statutes, we put it in.

"Mr. Bennett. The gentleman does not mean to say that there is no statute definition of the word 'person'?

"Mr. Hardy. I doubt if there is any, including the definition that we give here.

"Mr. Bennett. Corporations and members of partnerships are indicated in every district in the United States on statutory definition.

"Mr. Saunders. That may be as to particular offenses. Is this or not a correct definition?

"Mr. Bennett. So far as I am concerned I am not as competent to decide that question as the gentleman from Virginia.

"Mr. Saunders. Can the gentleman think of anybody who ought to be brought in that this does not bring in? If he does, let him tell us and we will bring him in.

"Mr. Towner. Mr. Chairman, I think this applies only to persons referred to in this bill. I think it is perfectly proper for it to define the word 'person' as used in this bill, because that is for the assistance of the court. Courts very often have difficulty in determining the definition of words. And in doing that we have to ascertain the meaning that was intended by the legislature, so all of these definitions given in this bill are definitions that are intended to be conveyed and those words are used in the bill and it certainly seems to me it is perfectly proper for the committee to have defined them in that way.

"The Chairman. The question is on the amendment offered by the gentleman from New York.

"The question was taken and the amendment was rejected.

* * * * *

"Mr. Bennett. Mr. Chairman, I move to strike out the last word, and I call the attention of the gentleman from Virginia to this. The

gentleman from Virginia asked me if I could suggest any improvement in this definition. I hold in my hand the Revised Statutes, and I desire to say I think I can, because if these framers of the Revised Statutes were right, the gentleman could never convict a natural person. When the framers of the Revised Statutes had the question before them they provided as follows:

"The word 'person' may be extended or applied to partnerships and corporations.

"Of course this is an artificial definition, and in a penal statute a man who is indicted, a natural person, could plead that he was not a person, not being a partnership, corporation or association. I will ask the gentleman from Virginia (Mr. Saunders), in the interest of certainty, whether he does not think it would be a good idea to adopt the wording of the Revised Statutes, which is 'the word person may extend and be applied to'?

"Mr. Saunders. I do not think it at all necessary; but I will say, in deference to the gentleman, that I shall not have any objection to accepting it.

"Mr. Bennett. Mr. Chairman, I ask unanimous consent.

* * * * * *

"Mr. Saunders. I would advise that the gentleman address that to the chairman of the committee. There is no difference in the world. It is only the difference between tweedledum and tweedledee.

"Mr. Bennett. Mr. Chairman, I ask unanimous consent that in line 19 the language may be changed by striking out the word 'includes' on page 2, and inserting in lieu thereof the words 'may extend and be applied to.'

"Mr. Hardy. I object, Mr. Chairman."

It is apparent from the above quoted remarks of members of the House that both the proponents of the bill and those seeking to amend it were of one mind with respect to the purpose of the paragraph relating to the word "person" as used in Section 1 of the Act. They all spoke of the paragraph as being a *definition*, and it is plain that the advocates of the measure intended by the paragraph to extend the meaning of the word "person" so as to include all possible forms of organization which they sought to bring within the regulatory provisions of the Act. This is apparent from the question asked by Mr. Saunders of Mr. Bennett when he said:

"Can the gentlemen think of anybody who ought to be brought in that this does not bring in? If he does, let him tell us and we will bring him in."

The same thought was expressed by Mr. Towner when he said:

"I think this applies only to persons referred to in this bill. I think it is perfectly proper for it to define the word 'person' as used in this bill, because that is for the assistance of the court. Courts very often have difficulty in

determining the *definition* of words. And in doing that we have to ascertain the *meaning* that was intended by the legislature, so all of these definitions given in this bill are *definitions* that are intended to be conveyed and those words are used in the bill * * *." (Emphasis added.)

Furthermore, Mr. Bennett, in speaking of the definition of the word "person" as contained in this paragraph said:

> "If you do not happen to have made *as full* a definition as some court has, you *limit the court*. It is useless, simply burdens up the act, and in addition contains a real danger, because, as every lawyer knows, *the assertion of one is the exclusion* of others; * * *." (Emphasis added.)

Mr. Bennett was undoubtedly referring here to the well-known canon of construction expressed as follows:

> "*Inclusio unius est exclusio alterius.*"

This assertion of Mr. Bennett was not controverted in any way. Indeed, the whole discussion indicates very clearly that all were agreed that the paragraph was intended to define the word "person" and that it was intended to include every form of organization that Congress desired to bring within the regulatory provisions of the Act.

A State most certainly is not a "corporation, partnership, and association, existing under or authorized by the laws of the United States or any

state, territory, district or possession thereof, or of any foreign country" but is a soverign body existing only by reason of the Act of Congress admitting the State into the Union. We submit, therefore, that since the very wording of the definition does not include a sovereign state, and since it appears from the debates on the definition that it was intended to be exclusive as well as inclusive, the legislative history unquestionably shows that the Act was not intended to apply to a sovereign state.

We submit that the definition of the term "person" in Section 1 of the Shipping Act, 1916, as amended, was not intended to include a State for the following additional reasons:

All of the persons enumerated in the definition are of a single type or class, and have one salient characteristic in common. They are all private in their nature, being either individuals or private corporations or associations or representatives thereof.

This enumeration of a restricted class of persons, and the presumably deliberate omission of any reference to states, cities or other public bodies or agencies, indicate an intention on the part of Congress to confine the Commission's jurisdiction to private individuals and private persons, and not to extend it to states or political subdivisions or administrative agencies thereof.

The definition appearing in Section 1 of the Shipping Act, 1916, as amended is in contrast with language used in other Federal statutes.

See for example, Title 50, "War", Section 124 of the U. S. Code, there the term "Person" is defined to include:

> "States, Territories, the District of Columbia, Alaska, and other dependencies of the United States, and *municipal subdivisions* thereof, individual citizens, firms, associations, societies, and corporations of the United States and of other countries at peace with the United States."

See, also, Title 7, "Agriculture", Sec. 16, U. S. C. —Secretary of Agriculture authorized to cooperate with

> "Any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or *political subdivision* thereof, or any person",

and Sections 545 and 587, Title 7, U. S. C., where similar language appears.

See, also, Title 33, "Navigation and Navigable Waters," Sec. 702d-1, U. S. C.:

> "Any citizen, association, railroad, or other corporation, state or public agency thereof",

and, also, Sections 565 and 592, Title 33, U. S. C.:

> "Any state, municipality, corporation, firm, district, or individual,"

and, also, Section 396, Title 43, U. S. C.

From a consideration of the definition of the word "person", as used in all of the above mentioned Acts; it would seem to be a reasonable conclusion that when the word "person" as used in any Act of Congress is intended to include a State or a political subdivision thereof, the statute expressly so states, whether the statute is regulatory in nature or calls for cooperation between the Federal Government and a State or a subdivision thereof. A further inference is justified that where the definition of the word "person", as used in any Act of Congress does not expressly include a State or a subdivision thereof, it is the intention of Congress that a State or political subdivision thereof is not so included.

Commenting further on the language of the Shipping Act, 1916, as amended, it is to be noted that in Section 1 definitions of terms occur in the following order: the terms "common carrier by water in foreign commerce", "common carrier in interstate commerce", "common carrier by water". Then in paragraph four there is given a definition of the expression "other persons subject to this act".

After taking pains to state what this expression shall include, is it to be thought that Congress intended to state a part only of the groups or organizations which should be so included, and leave the rest to the imagination of the law-enforcing agency? Is it not a much more reasonable interpretation of the Act to ascribe to Congress the intent to include

every group and organization that would come within the expression?

The nonaction of the United States Maritime Commission and its predecessor officers and boards having authority to enforce the Shipping Act, 1916, is significant.

Although the Act has been in force since 1916, it was only very recently that it was first sought to be enforced against a State. This is a very strong indication that the executive officers charged with its enforcement did not think that it was intended to apply to a State. *United States* v. *Cooper Corporation*, 312 U. S. 600, supra.

Summarizing, it seems clear after a consideration of the subject matter, the context, the legislative history and the executive interpretation of the statute that it was not the intent of Congress that the Act should apply to a State or a political subdivision thereof.

B. Neither of the appellants is an "other person subject to this act" within the meaning of the Shipping Act, 1916, as amended, for the additional reason that neither is carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water, or any business whatsoever

It clearly appears from the evidence in this case that the State is not carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities "in connection with a common

carrier by water", or any other business. That the State is not engaged in a "business" of any kind appears from the testimony of Mark H. Gates, Secretary of the Board of State Harbor Commissioners for San Francisco Harbor, to the effect that under the laws of the State of California, the Board of State Harbor Commissioners must raise sufficient money to pay all of its expenses and cannot raise any more than that. (R. 473, 489, 490.) (*Secs. 3080 and 3084, Harbors & Navigation Code of the State of California.*)

In *Denning* v. *State*, 123 Cal. 316, 321, 55 Pac. 1000, 1001, the Court used this language:

> "These provisions of the constitution clearly show that the state has retained the control of the harbors and frontages thereon for the use and benefit of the people, for the promotion of commerce and the general benefit of the body politic, *and not as a mere business enterprise* through which profits may accrue to the state treasury; and the statute creating the state board of harbor commissioners is intended and adapted to the execution of this purpose. * * * The fact that the board is authorized or required to collect tolls and charges for dockage and wharfage to such extent 'as will enable the commissioners to discharge the duties required of them by the act' *does not affect its character as a governmental agency.*" (pp. 321, 322). (Emphasis added.)

In any event, as shown in the proceedings in Docket No. 555 and the trial of this cause in the

Court below, neither the State of California nor the Board of State Harbor Commissioners for San Francisco Harbor is carrying on any business or any activity of any kind "in connection with a common carrier by water".

We have found no decision of any Court or administrative agency which gives an interpretation of the words "in connection with a common carrier by water". In determining the jurisdiction of the Commission, however, it is absolutely necessary to interpret these words.

As indicated in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, the primary purpose of the regulatory provisions of the Shipping Act, 1916, as amended, is to regulate common carriers by water. The Act concerns itself with transportation by water, and the United States Maritime Commission is designated as the regulatory body in connection with water carriers.

To interpret the words, "in connection with a common carrier by water" as applying to wharf operations only to the extent that such operations *form part of the act of water transportation*, is consistent not only with the precise language of the Shipping Act, 1916, as amended, but also with the general scheme which Congress apparently had in mind in enacting this statute—the regulation of transportation by water in a manner generally similar to the regulation of transportation by rail under the Interstate Commerce Act. If Congress

had cared to extend the application of the Act to other transactions, it would have been easy to use appropriate language to effect such purpose.

The facts adduced at the hearing of this proceeding relating to the demurrage charges of these respondents for inbound and outbound shipments show conclusively that these respondents do not perform any handling, servicing or moving services in connection with any acts of transportation.

We will first consider demurrage charges on inbound shipments. In the case of the terminals at Piers 45 and 56 and also in the case of the assigned piers, the transportation company, by virtue of its payment of rental for the pier, acquires the right to have cargo deposited thereon by a common carrier by water. Such deposit of goods on the pier is for the consignee of the goods. The facts in regard to such operation are as follows: When the ship docks, the carrier can determine from its manifest the cargo contained on the ship. From this manifest the appropriate consignees can be and are notified of the arrival of the cargo. The free time does not begin to run until the last load of cargo is deposited on the dock. (R. 495) This permits the consignee to have sufficient notice to enable him to remove his goods from the pier within the free time allowed. Prior to the time of the removal of the goods by the consignee the goods on an assigned pier are in the custody and subject to the control of the common carrier. Up to the time that the

goods are actually removed from the pier by the consignee the only parties who have any relations in regard to *its transportation* are the water carrier and the consignee.

Upon the expiration of the free time any demurrage charges assessed against inbound cargo are assessed against the consignee. This demurrage charge is assessed by the Board of State Harbor Commissioners, and the Board enters the transaction only because of the penalty aspect, penalizing the consignee for leaving goods on the pier beyond the free time, contrary to the proper functions of the port. In doing so, the Board is taking no part whatsoever in any agreement in regard to *transportation* of the particular goods in connection with a common carrier by water, or otherwise. Its sole object, purpose and function is to secure the early removal of the goods in order that the free flow of goods across the piers may be accelerated, thereby fully performing its governmental function in the maintenance and operation of the harbor with respect to such goods.

In the event of loss or damage to inbound shipments either during the free time or beyond the free time for which demurrage is assessed, the responsibility for this loss or damage rests upon the water carrier, or, if the goods are in the possession of a terminal, upon the terminal operator. "Exhibit 64a, page 20 (appears: R. 1082, in Evi-

dence, R. 651), under the heading of "No Responsibility Assumed" reads as follows:

> "The board assumes no responsibility for handling, insurance or otherwise, and reserves the right to terminate storage of any goods and to cause removal thereof at expense of owner."

In the case of outbound cargo, the transportation company, by virtue of its payment of rental for the pier, acquires the right to have cargo deposited thereon by the shipper and assembled and prepared by it for shipment on its vessels. The procedure in regard to such operation of deposit and preparation for shipment is as follows:

The shipper, upon advice from the steamship company as to the arrival of the vessel, will make an effort to deposit his goods on the pier so that they can be loaded upon the vessel within the free time. These shipments are received by the steamship company, acting through its own employees and agents on the pier. After deposit, the goods are in the custody of the carrier and its agents preparatory to shipment, and all handling services and services necessary for the preservation and safekeeping of the goods are performed by such employees and agents of the carrier. So far as the shipper is concerned, the *act of transportation* starts when the goods are deposited by him with the steamship company upon the pier.

If the vessel which is to carry the goods begins to load the goods within the free time, such time

does not expire until the loading is completed. (R. 506.) The free time provisions on outbound cargo are for the benefit of the steamship company or carrier in order that he may properly assemble these shipments for loading the vessel. In case the free time elapses before the ship begins to load, then demurrage charges are assessed against the ship for such time as intervenes between the expiration of the free time and the beginning of the loading.

The Board, from the time the goods are deposited on the wharf until they are loaded on the vessel, takes no part whatsoever in *handling, servicing or moving* the same and makes no charge for any such services. (R. 467, 476, 477, 496, 510.) Any charge which may be assessed against the vessel for demurrage is not a charge for any thing done by the Board in connection with *moving or transporting* the goods but rather is a charge imposed by the Board for the purpose of preventing congestion upon the pier and of promoting the prompt and free flow over such pier of the goods of all persons using the pier for transportation purposes. This is nothing more or less than the performance by the Board of its governmental and regulatory function in facilitating the movement of goods through the port, and the Board only enters that transaction because of the penalty aspects.

As is the case in connection with inbound goods, the responsibility for loss or damage of goods

deposited on the pier for shipment rests upon the water carrier from the time of such deposit.

It is submitted that both in the case of inbound and outbound cargo any charges made by the Board for demurrage are not made for any service or any act performed by the Board in **servicing, handling or transporting** the goods and hence are not made "in connection with a common carrier by water".

C. United States vs. California, 297 U. S. 175, 80 L. Ed. 567, 56 S. Ct. 421, is not authority for the proposition that the Shipping Act, 1916, as amended, applies to appellants or either of them.

United States v. *California*, supra, has been cited in argument in the Court below, as authority for the proposition that the Shipping Act, 1916, as amended, applies to appellants in this cause.

It is true that in the case of United States Maritime Commission No. 481, Wharfage Charges and Practices at Boston, Massachusetts, 2 U. S. M. C. 245, Examiner Gray concluded that the Shipping Act, 1916, as amended, applied to the Commonwealth of Massachusetts. In arriving at this conclusion, however, he relied upon and based his holding solely upon the case of *United States* v. *California*, supra, in which the Supreme Court of the United States held that the provisions of the Federal Safety Appliance Act (45 U. S. C. A. Sec. 1, et seq.) applied to the State of California when it engaged in the operation of a Belt Line Railroad.

We point out, however, that the language used in the Federal Safety Appliance Act was wholly different from the above quoted provisions of the Shipping Act, 1916, as amended, in these respects:

Section 2 of the Federal Safety Appliance Act which was alleged, in *United States* v. *California, supra*, to have been violated, provided in part:

> "It shall be unlawful for any common carrier engaged in Interstate commerce by railroad to haul or permit to be hauled on its line any car used in moving Interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 6 of the same Act provided the penalty for the violation of Sections 2 to 5, inclusive, of the Act. In neither Section 2 nor Section 6, however, was there any restrictive definition of the phrase "common carrier," such as we find in Section 1 of the Shipping Act, 1916, as amended. Although the Federal Safety Appliance Act contained definitions of the term "common carrier," those definitions by the express language of the Statute did not apply to Sections 2 and 6, but only to Sections 17 and 18 and 23 to 34, inclusive, of said Act. (See Sections 20 and 22.) Here there was no necessity for the Court to determine whether a state was included within the terms "person", "corporation", "partnership" or "association." All that was necessary was for the Court to determine whether as a matter of fact the State was a common carrier engaged in

interstate commerce by railroad, and having determined that question, in the affirmative, it immediately followed that the State was subject to the provisions of the Act. The Shipping Act, 1916, as amended would be comparable to the Federal Safety Appliance Act, if, instead of providing that "other persons" should be subject to the Act and that the term "person" included corporations, partnerships and associations, it had provided that any wharfinger or owner of a wharf came within the provisions of the Act. It is sufficient, however, to say that the Shipping Act, 1916, as amended, does not by its terms specifically apply to *every wharfinger or owner of a wharf*, but, on the contrary, applies only to individuals, corporations, partnerships and associations furnishing wharfage, etc., in connection with a common carrier by water.

Had the Congress of the United States, in enacting the Shipping Act, 1916, intended that it should apply to every wharfinger or owner of a wharf, it would have been very easy to have said so in express language. It would likewise have been easy to have specifically named a State if it was intended the Act should apply to a State. This would have been the natural way of providing for the inclusion of a State, particularly in view of the well-known fact that a great number of the port facilities in this country are owned and controlled by States or political subdivisions thereof, but having knowledge of the language that was previously used in the Fed-

eral Safety Appliance Act, which included every common carrier, the Congress did not use such all-inclusive language but instead used the more specific and narrow language of "any other person, * * *," thus showing an intention not to include every wharfinger or owner of a wharf and particularly a State. By limiting the application of the Act to individuals, corporations, partnerships and associations, it is clear that it was the intention of Congress that the Act should apply only to persons and combinations of persons engaged in private business and not to governmental instrumentalities.

For the reasons hereinabove assigned, it is submitted that the Shipping Act of 1916, as amended, does not purport to apply and does not apply to either of these appellants, State of California or Board of State Harbor Commissioners for San Francisco Harbor in respect to the activities affected by the order of the United States Maritime Commission of September 11, 1941, or otherwise.

Point 3. The United States Maritime Commission Has No Jurisdiction Over Wharf Demurrage or Storage Rates

Without regard to the question whether Congress may constitutionally authorize the United States Maritime Commission to regulate rates of a State or an agency thereof owning, conducting or administering a wharf or wharf facilities, or whether Congress intended in the Shipping Act, 1916, as amended, to include a State or its agencies

within the phrase "other person," the Commission has no jurisdiction over wharf demurrage or storage whether imposed by a State or its agency or by anyone else.

The powers of the United States Maritime Commission are statutory, consequently, they are restricted to those conferred by the Act. In this respect the powers of the Maritime Commission are limited as are the powers of the Interstate Commerce Commission as shown in *New England Divisions Case,* 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605.

Indeed, in its final report, the Commission did not claim any right to regulate rates but claimed it has the power to affect rates by condemning them as practices in violation of Sections 16 and 17 of the Act prohibiting undue or unreasonable prejudice or disadvantage and unjust and unreasonable practices.

Sections 15 to 17, inclusive, and Sections 29 and 21 are the only sections of the Act which mention "other persons subject to the Act"; hence, we look to those sections to ascertain the powers of the Commission with reference to regulations of rates and charges of any other than a "water carrier", and, particularly, of an "other person" as defined by the Act.

Section 15 has no reference to such regulation of rates, as it relates only to the filing and contents of agreements mentioned therein.

Section 16 provides:

"That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Second. To allow any person to obtain transportation for property at less than the regular rates then established and enforced on the line of such carrier, by means of false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

"Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act."

There was no allegation in the proceedings before the Commission, nor was any claim made in the final report, that there was any violation by appellants of the provisions of the second and third subdivisions of Section 16.

For this reason we are concerned here only with the provisions of the first subdivision of that section.

Section 17 provides:

"That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

"Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

The first paragraph, of this section by its terms, applies only to a "common carrier by water in foreign commerce". This paragraph does not mention "other person subject to this Act". The para-

graph forbids any common carrier by water in foreign commerce to "demand, charge or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports or unjustly prejudicial to exporters of the United States as compared with their foreign competitors". The paragraph also authorizes the Commission, when it finds that any such rate, fare or charge is demanded, charged or collected, "to alter the same to the extent necessary to correct such unjust discrimination or prejudice . . .".

The second paragraph of Section 17, by its terms applies to common carriers by water in foreign commerce, and also "every other person subject to this Act", and provides that every such carrier and every such other person "shall establish, observe and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivery of property".

The paragraph further provides that when the Board finds that any such regulation or practice is "unjust or unreasonable, it may determine, prescribe and order enforced a just and reasonable *regulation or practice*".

Viewing the Section as a whole, there is a clear distinction made between the prohibitions imposed upon common carriers by water in foreign commerce and any "other persons subject to this Act". The first paragraph deals with rates, fares or charges and makes no mention whatsoever of a

regulation or a practice. The first paragraph is broad enough in its prohibitions to cover any "'charge" which is unjustly discriminatory between shippers or ports or unjustly prejudicial to exporters, etc.

By way of summary, the first paragraph is broad enough to include the whole subject of rates and charges made by a common carrier by water in foreign commerce.

The second paragraph of Section 17, however, makes no mention at all of a "rate" or a "fare" or a "charge". The paragraph is merely concerned with the "regulations and practices".

It seems obvious that if there was any intent on the part of Congress to regulate rates or charges in connection with the receiving, handling, storing or delivery of property, it would have used appropriate language to attain this object. Under commonly accepted rules of statutory construction, the failure to mention "other person" in the first paragraph of Section 17 signifies that it was the intent of Congress that such "other person" is not subject to the kind of regulation provided for in that paragraph.

By the use of this language in these two paragraphs in relation to the prohibitions against water carriers, on the one hand, and "other persons", on the other, a presumption is raised that the Legislature intended a different meaning and effect to the prohibitions; that is to say, that the prohibi-

tions in the first paragraph related to rates, charges, etc., whereas the prohibitions in the second paragraph related to something entirely different, to-wit, regulations and practices.

McCarthy v. *Board of Fire Commissioners*, 37 Cal. App. 495-497, 174 Pac. 402.

This construction of Section 17 of the Act is borne out by the provisions of Section 18. That Section relates only to common carriers by water in Interstate commerce. The first paragraph of that Section provides in part as follows:

> "That every common carrier by water in Interstate commerce shall establish, observe and enforce just and reasonable rates, fares, charges, classifications and tariffs, and just and reasonable regulations and practices *relating thereto*, and to . . . the manner and method of presenting, marking, packing and delivering property for transportation, . . . the facilities for transportation and all other matters relating to or connected with the receiving, handling, transporting, storing or delivering of property." (Emphasis ours.)

Here we have, in one sentence, duties imposed by the Statute upon every common carrier by water in Interstate commerce. These duties are of different kinds. There is a duty to establish, observe and enforce just and reasonable rates, fares and charges; another duty is to establish just and reasonable regulations and practices relating thereto, and also just and reasonable regulations

as to all other matters relating to or connected with receiving, handling, transporting, storing or delivering of property.

The fourth paragraph of this Section provides that whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation or practice is unjust or unreasonable, it may enforce a just and reasonable maximum rate, fare or charge or a just and reasonable regulation or practice.

There is, then, in Section 18 the same clear distinction and separation in thought between rates, fares and charges on the one hand and regulations and practices on the other that we find in Section 17. We submit, therefore, that the only reasonable interpretation of these two Sections is that where Congress intended to vest the Commission with power to regulate rates or charges of any kind, including wharf demurrage and wharf storage, it explicitly so stated; that Congress was careful to make a clear distinction between powers vested in the Commission to regulate rates and charges, and power to enforce just and reasonable regulations or practices.

The only reasonable conclusion, therefore, is that Congress did not intend, in Section 17 of the Act or any other part thereof, to vest the Commission with any power to regulate any wharf storage or wharf demurrage rate or charge made by anyone other than a common carrier. All the power that is given to the Commission with respect

to wharf demurrage and wharf storage with respect to "every other person subject to this Act" is the enforcement of reasonable regulations and practices with respect to these matters, not involving the fixing or determination of any rates or charges.

We are not unmindful of the language used in *McNeely & Price Co.* v. *Philadelphia Piers, Inc.*, 196 Atl. 846 (Pa.), in which the Court said that the phrase "just and reasonable regulations and practices" as used in paragraph 2 of Section 17 "is comprehensive enough to give the Shipping Board (now the United States Maritime Commission) power" over "other persons subject to the Act". We submit, however, that the Court in this case held that the matter of regulation of the wharf charges on defendant's piers was under the jurisdiction of the Interstate Commerce Commission and that what the Court stated in said opinion with respect to the powers of the United States Maritime Commission was merely dicta. Furthermore, the above mentioned statement was condensed into eight lines of an opinion covering fifteen pages, and consisted merely of a bald conclusion arrived at without any reasoning whatsoever. The statement is, therefore, of no value as an authority.

It is only by construction that the Commission, contrary to the plain terms of the Act, and, we submit, by a misconstruction of them, has built up the theory that it has the power to regulate the rates

under the guise that the rates which it presumes to regulate are unjust or unreasonable regulations or practices under Section 17 and/or undue or unreasonable preferences or advantageous under Section 16.

At this point it is well to take note of the legislation which has resulted in the control which the Commission may exercise over rates of any kind.

Up to the time of the enactment of the *Intercoastal Shipping Act of 1933,* 47 Stat. 1425, 46 U. S. Code, Sec. 843, there was no requirement that water carriers should file their tariffs or give notice of tariff changes. The Merchant Marine Act of 1936 broadened the field of regulation, and the Act of June 23, 1938 (52 Stat. 964, 46 U. S. Code, Sec. 845a) for the first time gave the Commission the power to fix minimum rates of water carriers.

This last Act amended the Intercoastal Shipping Act of 1933, which, in itself, was amendatory of the Shipping Act, 1916.

The Intercoastal Shipping Act of 1933 applied only to water carriers in interstate commerce through the Panama Canal. It was amended by the Act of June 23, 1938, by adding Sections 4 and 5 reading as follows:

> "Sec. 4. Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice demanded, charged, collected, or observed by any carrier subject to the provisions of this Act is unjust or unreasonable, it may determine, prescribe, and order enforced

a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge, or a just and reasonable classification, tariff, regulation or practice: *Provided,* That the minimum-rate provision of this section shall not apply to common carriers on the Great Lakes.

"Sec. 5. The provisions of this Act are extended and shall apply to every common carrier by water in interstate commerce, as defined in section 1 of the Shipping Act, 1916."

This is the legislation as it now stands with respect to the powers of the Commission with respect to rates of water carriers. The limitation of the power is important to note. There is no provision for the fixing of minimum rates for carriers in foreign commerce, nor even for common carriers on the Great Lakes. Most important of all, there is no mention whatsoever of the rates of "other persons subject to this Act".

This omission of any provision as to the rates of "other persons * * *" is a continuation of the legislative policy of the original Shipping Act, 1916, and indicates to a certainty that Congress did not consider that the Commission was given any power, under any of these Acts, to regulate the rates of any one other than water carriers, that is to say, that it had no power over the rates of "other persons * * *."

The Report of the Commission upon which was based the Order of September 11, 1941, finds that wharf demurrage and storage is furnished below cost and that the effect of this upon the users of

other services of the appellants, who are so situated that they cannot take advantage of the low demurrage and storage rates, is that they are required to pay the same rates for the other services as those who are advantaged by the low demurrage and storage rates. The effect then upon these other persons is of two kinds: (1) they must assume the burden of the loss so sustained by the low rates of wharfage and demurrage, or, (2) be denied hope of a downward revision of rates for such other services. The inference from this is that these users of other services are being discriminated against and therefore Sections 16 and 17 of the Shipping Act, 1916, as amended, are violated.

These conclusions in the Report are best evidenced by the following quotations therefrom:

> "Wharf demurrage is the charge accruing on cargo left in possession of the terminal beyond the free time period. The question here is whether respondents are unduly discriminating between such cargo and that removed during the free time period. The principal evidence on this point is an analysis of the cost of providing wharf storage to determine whether that class of service is self-sustaining *or is furnished at rates so low as to cast a burden upon other services.*" (R. 26) (Emphasis added.)
>
> ". . . As will be demonstrated, the present rates as a whole produce revenues which are far below the cost of the service as computed according to the Edwards-Differding formula. The

general theory of this formula is that the responsibility of providing adequate revenues for essential terminal facilities rests upon the cargo and the carrier. The charge for each service is made to cover the direct cost incurred in rendering the service and some portion of the joint or overhead cost which are properly attributable to it." (R. 29)

"The foregoing analysis of costs shows unmistakably that users of wharf storage service are not providing their proper share of essential terminal revenues. It must be apparent also that a disproportionate share of this burden is being shifted to users of other terminal services whose charges are based on rates considered to be reasonable in 1935." (R. 32)

"The next question is whether granting storage at non-compensatory rates is unduly preferential and prejudicial in violation of section 16 of the Shipping Act, 1916, and an unreasonable practice in violation of section 17 thereof. The storage cases previously mentioned, 1 U. S. M. C. 676 and 2 U. S. M. C. 48, establish two propositions. First, the furnishing of free storage facilities beyond a reasonable period results in substantial inequality of service as between shippers. Clearly the furnishing of such facilities at non-compensatory rates is merely a less serious form of the same offense. Second, any preferred treatment by charges or otherwise of certain classes of cargo results in a discrimination against other cargo." (R. 33)

And, lastly, it is said:

"Oakland contends there can be no discrimination since the rates are open to all shippers alike. In a sense this is true. However, the commercial practices of those shippers who supply the major portion of tonnage handled by respondents obviously do not permit of their placing their goods in storage. Furthermore, it should not be overlooked that the practice of furnishing one service below cost has a tendency to prevent any downward revision of rates for other services however justified they may be. Clearly such a practice is unreasonable.

"The decisions cited are ample authority for condemning the existing wharf storage rates and practices as being in violation of sections 16 and 17 prohibiting undue prejudice and unreasonable practices." (R. 35)

With respect to what is stated in the last two paragraphs of the above quotations from the Report, it should be noted that the proceedings before the Commission were taken on its own initiative and not based upon complaints of shippers; indeed, there was no testimony taken at the hearing from shippers on the subject of wharf storage or demurrage rates. It would seem a legitimate conclusion from this that the users of the services of appellants did not feel that they were disadvantaged by any unreasonable practice or undue preference.

Notwithstanding the fact, however, that we find no provision whatsoever in the Act empowering the Commission to fix rates of any kind, the Com-

mission recommended that such a minimum rate be established and this recommendation was included in and made a part of the order of September 11, 1941.

In taking this action the Commission relied upon and at the trial the action was justified largely upon the basis of the decision of this Court in *Baltimore and Ohio R. R. Co. et al.* v. *United States, et al.*, 305 U. S. 507, 83 L. Ed. 318, 59 S. Ct. 284. In that case certain activities of the defendant railroad carriers were found to be illegal. (*Ex parte* 104, Part VI, *Warehousing & Storage of Property by Carriers at the Port of New York, N. Y.*, 198 I. C. C. 134; 216 I. C. C. 291, and 220 I. C. C. 102.) It was found by the Commission and by the Court that the carriers furnished warehouse space to certain shippers, which service was not included in the carriers' tariff and which was extended to these shippers at rates less than the rates which were charged other shippers for the same class of service and held by the Supreme Court to be non-compensatory.

The particular practices with respect to this storage were brought to the attention of the Commission by complaints of warehouse operators in the New York District that warehouses owned and controlled by the carriers were being operated contrary to the Interstate Commerce Act.

These practices were of two kinds: first, the furnishing of storage by the defendant carriers at the

Port of New York to selected and favored shippers at noncompensatory rates, which were below the rates of private warehousemen and below the rates which shippers over the carrier's lines, not so favored, were required to pay for such services; and, second, the furnishing by the carriers to favored shippers of so-called storage-in-transit at the Port of New York at noncompensatory rates under the carriers' rules and regulations governing this privilege.

Shippers obtaining these low storage rates from the carriers were accorded the same transportation rates westbound from New York as were charged to shippers who could not take advantage of them. With respect to these practices, this Court concluded:

> "It is immaterial that the shipper pays fair value or the market price for the extra privilege he enjoys. Section 6 (7) of the Act forbids the carrier to receive less than the published rates for transportation or to remit 'by any device' any portion of the rates.' When services, not necessary for transportation, are furnished below cost in an effort to acquire rail transportation, as was done here, this provision is violated. Since the carrier warehouse rates, as found by the Court and Commission, are not open to all shippers alike, there is violation of sections 2 and 3 (1) prohibiting discrimination and unreasonable prejudice. The rail transportation rates have charged against them the loss occasioned by

warehousing practices designed to attract a volume of rail business."

The sections of the Interstate Commerce Act referred to in the above quotation, at the time of the decision, read as follows:

"Sec. 2. If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

"Sec. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Sec. 6. . . (7) . . nor shall any carrier charge or demand or collect or receive a greater

or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

It is important here to note what was said in the decision of the Interstate Commerce Commission in regard to the storage of goods in transit. We quote from that decision 216 *I. C. C.*, page 342, 343, as follows:

"In appendix III to the prior report the loss per ton on freight stored under the in transit tariffs by the trunk lines respondents during the year 1931 in the port of New York district is shown. The losses range from $1.28 to $6.18 per ton and then as now a large percentage of tonnage stored consisted of crude rubber. In most cases it is not contended on this record that the rates under in transit tariffs compensate the carriers for the cost of storage and handling. No pretense is made that the storage and handling rates on crude rubber and wood pulp are compensatory and one prominent witness for respondent when asked if he knew the *out of pocket loss incurred* in the storage and handling of crude rubber testified 'I know that those

things do not in themselves pay for handling the traffic'. This witness in effect admitted that *the storage costs, without considering the handling costs, exceed the revenues derived from the two services.*" (Emphasis added.)

It is apparent, therefore, that the Commission found that the carriers were giving the storage services mentioned by performing a function not within their duties as a carrier by rail and furnishing the service at an out-of-pocket loss, thereby placing a burden upon other customers of the carriers who could not avail themselves of this special service.

With respect to this decision, the following comments are pertinent: The Court and the Commission found that the noncompensatory warehouse services were given to certain "favored shippers", and that they were not "open to all shippers alike", the wording of the Commission's finding being:

> "It should be borne in mind that carrier-controlled warehousing facilities are not available to the general public but only to selected concerns controlling large volumes of traffic * * *." (198 *I. C. C.*, at 197)

It appears also that the basis for finding that the warehouse services were noncompensatory was that they were furnished at an *out-of-pocket loss.* (Emphasis added.)

In this respect, the situation is quite different from the practice of appellants in regard to wharf

storage and demurrage in that there is nothing in the case at bar to show that all such services were not extended to all persons who applied for them, nor is there anything to show that any shipper was favored in any respect over another. It appears, also, that in the *Baltimore and Ohio case* the *commercial* warehouses were carried on at a "substantial loss" and "resulted in serious waste", the extent of waste of space being set out in the decision; that the loss incurred by the carriers in connection with their warehouse projects during the year 1931 was $1,260,441.

Contrasted with this finding, in the case at bar it was found in the Report of the Commission (R. 37), with respect to the storage rates recommended to be established by appellants

> "It is not believed that any increases in storage rates would result in the establishment of the 4090 scale at the San Francisco assigned piers."

After considering the evidence as to cost of wharf demurrage and storage at certain of the ports about San Francisco Bay, the Commission in the instant case stated, in regard to costs at San Francisco:

> "Unit costs at other terminals could not be developed because of the accounting methods they used. However, Oakland and San Francisco submitted general data which, when considered by the cost developed by Howard, Encinal and Stockton, indicate that their rates are far from compensatory." (R. 31)

Nothing further was found as to costs at San Francisco; hence, it is impossible to state whether the alleged loss resulting from wharf demurrage and storage rates at San Francisco was or was not substantial.

Further distinguishing the *Baltimore and Ohio* case from the instant case, it must be noted that in the first named case the Court was dealing with the practices of railroads alleged to be in violation of a statute which primarily was concerned with the rates charged by interstate railroads; whereas, in the instant case, we are concerned with the practices of persons furnishing wharfage facilities under an Act which says not a word about the power to fix rates.

Of still greater significance is the fact that the order of the Interstate Commerce Commission, the validity of which was questioned in the *Baltimore and Ohio case* did not fix any rates of storage which was required to be imposed and collected by the respondent carrier, as was done in the instant case; the order simply required the respondent carriers to cease and desist from permitting such storage at rates and charges which fail to compensate the respondent for the cost of providing space.

It is clear, therefore, that the decision in the *Baltimore and Ohio* case is based on facts so different from those of the instant case that it is not an authority on the question of the power of the United States Martime Commission to fix minimum

rates which appellants may charge for wharf storage and demurrage.

We submit that the United States Maritime Commission has no jurisdiction over wharf demurrage or storage rates, and was acting beyond its jurisdiction when it purported to establish minimum rates for demurrage and storage rates by its order of September 11, 1941. (Docket 555)

Point 4. There Is No Evidence to Support the Finding of the Trial Court That the Rates of Appellants for Wharf Demurrage and Wharf Storage Were Producing Revenues Which Were Substantially Less Than the Cost of the Service, and Were Not Compensatory

The evidence in regard to cost of wharf demurrage and wharf storage on the facilities of the appellants was fragmentary, and wholly inferential. With respect to investigation of these matters, witness T. G. Differding said:

> "Mr. Townsend: May I interrupt for just a moment? When you refer to making studies of the terminals there in that last sentence, you referred to the private terminals did you not?
>
> "The Witness: This is confined entirely to private terminals. We made no physical checks of the public terminals except that the facilities under assignment, or what you choose to call it at that time the San Francisco Terminals, now called the Golden Gate Terminals, and State Terminals were using. We did make similar checks there. However, the matter of wharf de-

murrage, and the incidental charges in connection with it, were entirely under the control of the State Harbor Board and we went no further than that. In other words, as far as those two facilities are concerned, it was confined to the *services rendered other than the wharf demurrage or storage matters.*" (R. 247) (Emphasis added.)

Furthermore, the evidence showed that the Board of State Harbor Commissioners has not made any studies to develop the unit cost of wharf demurrage on the basis of the Edwards Formula and has not made any such studies on any other basis (R. 580). The accounting records of the Board are not kept in such a way that such unit costs would be readily ascertainable (R. 580).

From Exhibit No. 135 (R. 1255, 1258, in Evidence R. 539-540), it appears that in the fiscal year ending June 30, 1939, the income from tolls, and wharf demurrage were as follows: Tolls $628,339.24; Wharf Demurrage $166,341.27.

For the year ending June 30, 1940, the same items of income were: Tolls $846,312.49; Wharf Demurrage $157,421.18.

Assuming, for the sake of argument that the amounts received for demurrage were less than the cost of this service, it is impossible from the evidence taken at the proceedings before the Commission to ascertain whether the difference, if any, between each of these two amounts of $166,341.27 and $157,421.18, respectively, and the cost of the

wharf demurrage service for the respective year, as compared with the totals of the charges for those years for tolls (the only other charge to shippers which would be for the use of wharf facilities) is *substantial* or *neglible* in amount.

Consequently; even if the cost of rendering wharf demurrage and storage services were calculated on the basis of the Edwards Formula there is no basis or support for the finding that appellants' rates for these services were *substantially* less than the cost of the services, and therefore not compensatory.

In any event, these appellants contend that the basis for determining whether their rates produced revenue that was compensatory should not be the Edwards-Differding Formula but should be the out-of-pocket costs of appellants for these services.

As we have seen, the Interstate Commerce Commission found in the hearing which was the basis for the decision in *Baltimore and Ohio R. R. Co.* v. *United States, supra*, that the revenue of the carriers from warehouse services rendered to shippers was less than the out-of-pocket costs of the carriers for such service.

It should be emphasized in this connection that a public wharfinger is not a carrier. As to certain of his functions, he has no connection with a carrier but does have relations with shippers or consignees. Storage, as indicated by the decision in the above mentioned case, is not a part of transportation, and, consequently, is not a transportation

service. It is, however, one of the recognized functions of a public wharfinger.

In the case at bar there is no testimony or exhibit in the record, in short, no evidence of any kind as to the amount of the out-of-pocket costs of the appellants for wharf demurrage and storage.

In the absence of a showing that appellants' out-of-pocket expenses for these services, exceeded the revenues from the services, it follows that no burden is cast upon the users of other services, and there is no discrimination in violation of Section 16 or Section 17 of the Shipping Act, 1916, as amended, or otherwise.

In *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 63 L. Ed. 772, 39 S. Ct. 375, the Court (Opinion of Mr. Justice Brandeis), speaking of the limits of the rate regulating power of the Interstate Commerce Commission, said, at page 464:

> "In construing this provision it is important to bear in mind the limits of the Commission's control over rates. Neither the Act to Regulate Commerce nor any amendment thereof has taken from the carriers the power which they originally possessed, to initiate rates; that is, the power, in the first instance, to fix rates or to increase or reduce them. Legislation of Congress confers now upon the Commission ample powers to prevent by direct action the exaction of excessively high rates. The original act, proceeding upon the common-law rule which prohibits carriers from charging more than reason-

able rates, gave the Commission power to declare illegal one unduly high; but even after such a determination the Commission lacked the power to fix the rate which should be charged . . .

"Congress, however, steadfastly withheld from the Commission power to prevent by direct action the charging of unreasonably low rates. The common law did not recognize that the rate of a common carrier might be so low as to constitute a wrong; and Congress has declined to declare such a rule. Despite the original Act to Regulate Commerce and all amendments, railroads still have power to fix rates as low as they choose and to reduce rates when they choose. The Commission's power over them in this respect extends no further than to discourage the making of unduly low rates by applying deterrents. One such deterrent is found in the fact that low rates, because voluntarily established by the carrier, may be accepted by the Commission as evidence that other rates, actual or proposed, for comparable service are unreasonably high. . . . The voluntary making of unremuneratively low rates in important traffic may also tend to induce the Commission to resist appeals of carriers for general rate increases on the ground of financial necessities. But the main source of the Commission's influence to prevent excessively low rates lies in its power to prevent unjust discrimination . . . The order prohibiting the unjust discrimination, however, leaves the carrier free to continue the lower rate; the compulsion being that if the low rate is retained,

the rate applicable to the locality or article discriminated against must be reduced. That is, the carrier may remove discrimination either by raising the lower rate to the relative level of the higher, or by lowering the higher to the relative level of the lower, or by equalizing conditions through fixing rates at some intermediate point."

In this decision, the Court reviewed the opinion of the Interstate Commerce Commission in *Commodity Rates to Pacific Coast Terminals*, 32 I. C. C. 611. In its opinion, at page 622, the Commission said:

"We are of the opinion that these carriers should be permitted to compete for this long distance traffic so long as it may be secured at rates which clearly cover the out-of-pocket cost. . . . Since the average ton-mile revenue of these carriers is approximately 9 mills on freight traffic, it is probable that a rate which produces 45 per cent as much as *the average pays more than the out-of-pocket cost and therefore does not impose a burden upon other traffic. None of the rates proposed appear, therefore, to the charge that they pay less than the out-of-pocket cost* . . . ." (Emphasis added.)

In 26 I. C. C. 20, 27, the Commission said:

"Anything above the out-of-pocket cost of handling is a contribution to general expenses, and to that extent tends to relieve rather than burden other traffic * * *"

The reason for the rule is stated in *Boilean* v. *Pittsburgh & L. E. R. Co.*, 24 I. C. C. 129, 132, where the Commission said:

> ". . . It is a well established and generally recognized rule that if additional business can be taken on at rates which will contribute at least a little in additional to the actual out-of-pocket expense, the carrier will be advantaged to that extent and all its patrons benefitted to the extent to which such traffic contributes to the net revenue. It is obvious that without the amount of net contributed by this class of traffic, assuming a certain amount of revenue to be necessary, such revenue must be contributed entirely by the remaining traffic and the exclusion of this competitive traffic would increase the burden upon the other traffic to a corresponding extent."

To the same effect is *Fourth Section Violations in the Southeast*, 30 I. C. C. 153, 177:

> "It may fairly be concluded from the testimony that there is none of these rates for long-distance traffic which pays less than the additional cost of handling and their acceptance by the railways results in some net revenue and does not result in an increased burden upon traffic to and from intermediate points."

Of importance in this connection is the principle enunciated in Lake Cargo Coal Cases, 181 I. C. C.

37, 51, quoting from *Galveston Com'l. Assn.* v. *Galveston, H. & S. A. Ry. Co.*, 128 I. C. C. 349, 379:

> "The fact that the law declares unlawful only discrimination that is unjust and only prejudice that is undue indicates that if was the intent to give the carriers some latitude in fixing rates, and that distance or cost of service need not be the sole criterion by which rates shall be measured."

It is a well-established principle in rate regulation that a rate initiated by a carrier may be lower than a rate that would be allowable where a carrier contends that a rate fixed by a regulatory body is confiscatory. To make this principle clear, we quote from the opinion of the Interstate Commerce Commission in Transcontinental Cases of 1922, 74 I. C. C. 48, at pages 68-70, as follows:

> "For the intermountain interests it is argued that a rate to be reasonably compensatory to the more distant terminal point must bear its full share of operating expenses, interest on funded debt, equipment and joint facility rents, taxes, and the percentage return fixed by us pursuant to section 15a of the interstate commerce act. In support of this interpretation various court decisions are cited defining the words 'reasonably compensatory,' or words that are said to be tantamount thereto.
>
> "We are unable to accept this interpretation of the phrase 'reasonably compensatory.' So interpreted, the long-and-short-haul rule of the fourth section must become absolute or rigid

from the very nature of the case. According to this version of 'reasonably compensatory,' the rate to the farther distant point must yield its full share of the expense of utilizing the additional track mileage covered, as well as its full share of the additional expenses incident to the longer use of equipment required for the longer haul. There may be difficulty in discovering to a nicety the exact legislative intent in the amended fourth section. But the rejection of an absolute long-and-short-haul clause by both Houses of Congress is inconsistent with any construction of the phrase in question which would be equivalent in effect to an absolute clause.

"A similar but less extreme interpretation of the words 'reasonably compensatory' is urged on behalf of various State commissions in the intermountain territory. It is pointed out that there is a margin between a rate which barely escapes being confiscatory and the highest rate which a regulating body may lawfully allow. To the intermediate point a rate might approach the latter limit while a rate to a more distant point might conceivably be less and yet not so low as to be confiscatory. Seemingly, the rate to the more distant point may contribute something less than a full proportionate share of return upon investment and thus theoretically be less than a greater rate to an intermediate point. This version of 'reasonably compensatory' seems to agree with the former interpretation in that both require that the rate to the more distant point must pay

its full share of all operating expenses, but is more elastic in not requiring that it must contribute its full share to the return designated as profit. Both interpretations appear to hold in common that a 'reasonably compensatory' rate can not be less than a rate which, if imposed by a regulatory tribunal, would be adjudged nonconfiscatory.

"We are unable to accept this interpretation of the words 'reasonably compensatory' as used in the amended fourth section.

"Where a rate imposed by a regulatory body is under judicial review upon the allegation that the rate fixed is confiscatory, it has been held by the courts that a rate may not lawfully be fixed by such tribunal which is based alone on the out-of-pocket costs ascribable to that particular traffic, but that to be lawful the rate must be sufficient to cover a ratable proportion of the average cost of freight traffic generally, including a return on the property devoted to public service. To hold otherwise would compel the performance of a certain specified kind of service by the carrier at less than average cost. The extension of this principle to other classes of traffic, if pursued far enough, would bankrupt the road.

"Where, however, carriers voluntarily propose to reduce certain rates to an out-of-pocket *plus* basis in order to augment the total traffic carried, a wholly different situation is presented. The menace of confiscation is absent, for *volenti non fit injuria*; and the additional traffic, if secured with a resulting augmentation of net

revenue instead of laying a burden upon other traffic, affords the possibility of lightening the burden thereon by bringing a greater tonnage under contribution to net revenue.

"The criteria of a reasonably compensatory rate in a confiscation case are therefore essentially distinct from the criteria of a reasonably compensatory rate where carriers volunteer a reduction on certain rates to an out-of-pocket *plus* basis. In the first set of cases the carrier has presumably been charged with seeking to extract from the public which is served more than the services are reasonably worth; in the second set of cases the carrier is accused by protestants, not primarily of seeking to extort more than the service is reasonably worth to those who receive the service but of working undue discrimination as between those who can and those who can not avail themselves of the lower rates voluntarily proposed.

"The criterion of a reasonably compensatory rate suggested by the carriers has been indicated above. It is summarized in the formula 'out-of-pocket-expenses-plus-some-profit.'" (Emphasis added.)

In *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S. 257, 22 S. Ct. 900, 46 L. Ed. 1151, at page 268, the Court said:

". . . It sometimes happens that, for purposes of ultimate profit and of building up a future trade, railways carry both freight and passengers at a positive loss . . ."

And in *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 77 L. Ed. 1410, 53 S. Ct. 768, the Court used this language:

> "Since 1887, § 1 has forbidden that an export or import rate be unreasonably high; and since the Transportation Act, 1920, the Commission has been charged to see that the rate be not so low as to render the receipts of the business unremunerative."

Of particular relevance to the present case in the light of the record and the foregoing authorities is the opinion of Mr. Justice Cardozo in *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023, at pages 505-6 of the official report:

> "The second report of the Commission is a long and discursive narrative. Two paragraphs at the end give the key to its meaning:—
>
> "'We find that the proposed rates, if permitted to become effective, would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by § 15a of the act; that they would cause a disruption of the individual groups from which the rates are proposed; and that they would cause a disruption of the long-standing rate relation existing for competitive purposes, between the several Indiana groups.

"'We find that the proposed rates would be unreasonable and in violation of §§ 1 (5) . . . and 15a (2) of the act . . .'

"The statement in the second of these paragraphs that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated . . . There is no suggestion in the report that the rates have been reduced as to be less than compensatory. True they do not reach the maxima beyond which charges are too low. A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself . . . We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute . . . Those tendencies excluded, 'a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate making as to it seems best. . . .'"

Previously, the learned Justice had said at page 504:

"This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida* v. *United States*, 282 U. S. 194, 215, 75 L. Ed. 291, 304, 51 S. Ct. 119; *United States* v. *Baltimore & O. R. Co.*, January 7, 1935, 293 U. S. 454, ante."

That statement leads us to a consideration of the authorities indicating the extent of the judicial re-

view the appellants are entitled to in the present proceeding.

In *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 77 L. Ed. 1166, 53 S. Ct. 627, Chief Justice Hughes, speaking for the Court, said at page 277:

> "A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the question of, administrative authority . . ."

It was said in *I. C. C.* v. *U. P. R. R. Co.*, et al., 222 U. S. 541, 547, 56 L. Ed. 308, 32 S. Ct. 108, that the findings of the Interstate Commerce Commission are final unless

> "beyond its statutory power; or . . . based on a mistake of law."

In the light of these principles let us examine the facts as disclosed by the evidence produced at the hearing before the Maritime Commission and upon which the order of September 11, 1941, was based.

First, we look at the Report of the Commission upon which was based the Order of September 11, 1943. (R. 32). The following appears on page 32:

The need for an upward revision in wharf storage rates is also evidenced by the income statements

of respondents for the calendar year 1939 or fiscal year 1940. The result of their operations is illustrated by the following table:

Table 5

	Net Income	Loss
Oakland	$78,950.67 (1)	$95,859.43 (2)
Stockton	29,447.47	99,491.55 (3)
Encinal		20,758.30
Howard		7,473.95
San Francisco	215,356.85 (4)	

1. If loss from airport operations be excluded.
2. If interest on bonds paid by City (other than interest on bonds assignable to airport) be included.
3. If revenue from county tax funds be deducted.
4. No deduction made for depreciation.

In the financial statement of the Board of State Harbor Commissioners as a part of Exhibit No. 135 (R. 1255, 1257, In Evidence R. 539), the value of the Buildings and Structures under the jurisdiction of the Board is given for the year ending June 30, 1940, as $56,750,151.63. One per cent (1%) of this amount (a very modest amount for annual depreciation) is $567,501.51, which amount is $352,144.66 in excess of the yearly net income of $215,356.85 shown above.

Now there is no evidence that this excess of $352,144.66 could possibly be made up or counterbalanced by any increase of wharf demurrage and storage rates, much less by the minimum rates

fixed by the Commission's Order. It follows therefore that it could be made up only by increasing the rates for wharfage-tolls, the only other charge made against shippers or consignees for use of the wharves.

This shows conclusively that the wharf demurrage and storage rates, if in fact too low, could not possibly have resulted in discrimination against or disadvantage or prejudice to those paying toll charges but not wharf demurrage or storage charges—certainly not in the way of preventing the lowering of rates.

There was no discrimination.

The minimum rates prescribed by the Commission in its order (R. 40, 42-43, 44-45, 62) are penalty rates as shown by these excerpts from the Report.

> "A *penalty* demurrage charge of 5¢ per day is exacted for the first five days beyond the expiration of free time. *This charge is intended to compel the removal of cargo off the dock or into storage.*" (R., p. 35.) (Emphasis added.)

And, in its conclusion in this respect, Appellee Commission held:

> "Upon consideration of all the evidence, we are of the opinion that the 4090 scale, *including the 5-cent penalty rate,* should be adopted . . ." (R., pp. 37-8.) (Emphasis added.)

Obviously, a charge which is a penalty is much higher than a charge which is merely compensatory.

In summary: The Maritime Commission has only limited jurisdiction. It purports to fix rates to prevent prejudice, disadvantage or discrimination. These rates are penalty rates, obviously higher than fully compensatory rates, and very much higher than rates which will produce out-of-pocket costs. A rate which will return out-of-pocket costs plus casts no burden on other traffic, and cannot be discriminatory. There is no evidence in the record that appellants' rates do not return out-of-pocket costs and more. There is no evidence that the revenues of appellants under present rates produce an amount substantially or at all less than cost computed on the Edwards-Differding formula. There is no evidence that the rates fixed by the Commission's order will produce sufficient revenue, when added to other revenues, to enable the appellants to square income with expenses, after allowing for depreciation.

Considering all of these facts, it is submitted that the order of the Commission of September 11, 1941, is arbitrary and capricious and beyond its jurisdiction.

Point 5. The United States Maritime Commission Has No Jurisdiction Over Wharf Storage

We have hereinabove under Point 2 of this brief urged that the appellants in charging for wharf demurrage and storage are not doing so "in connection with a common carrier by water".

In certain functions the wharf operator acts as the agent of the carrier and in certain others as agent of the shipper or consignee. The distinction is recognized in *Armour & Co.* v. *Alton R. Co. et al.* (C. C. A.-7th), 111 Fed. 2d 913, 915.

The question involved was whether the consignee of cattle could recover from the rail carrier the so-called yardage fee imposed by Union Stock Yards Company at Chicago on each head of stock passing through the yard, the theory being that this was an unloading charge which had already been paid for in the line haul rate. The Court said:

> "At the yards employees of the Yards Company unload the livestock into unloading pens located upon the company's property. For this service the company charges the carriers a certain rate which is filed with the Interstate Commerce Commission. Since this service is a rail transportation service, rendered by the carriers (through their agent, the Yards Company) for the shipper, the charge therefor is covered by the line-haul rate. *Adams* v. *Mills*, 286 U. S. 397, 52 S. Ct. 589, 76 L. Ed. 1184. On the other hand, in addition to and separate from the rendition of rail transportation services, the Yards Company also performs specified stockyard services such as holding, feeding and storing. In rendering such a special service the company is subject to the Packers and Stockyards Act, and for such services charges the packer a certain rate which is filed with the Secretary of Agriculture. 42 Stat. 159, 7 U. S. C. Secs. 181 et

seq., 201 (b)), 226 7 U. S. C. A., Secs. 181 et seq., 201 (b), 226.

"It might be said that in the rendition of a transportation service the Yards Company acts as agent of the carriers, but that in the performance of a stockyard service it acts as agent of the packer. *Adams* v. *Mills*, supra * * *. It has also been said that 'Stockyard services do not commence until unloading ends; they end when loading begins' * * *."

Swift & Co. et al. v. *United States*, 316 U. S. 216, 86 L. Ed. 1391. 62 S. Ct. 948, is in accord with this view.

That storage, other than that involved in the so-called free time period, is not part of transportation, is recognized in *Ex Parte* 104, *Propriety of Operating Practices*, New York Warehousing, in the decision in 198 I. C. C. 134, affirmed on rehearing in 216 I. C. C. at 292. The Commission said, at page 195:

"While the storage of property is clearly within the transportation service which carriers are obligated to furnish, their duty under these provisions extends only to that storage which is necessarily incidental to the transporting of such property. To be incidental business *the storage must be preliminary either to immediate transportation or immediate removal.*" (Emphasis added.)

The same view was taken in *Baltimore & O. R. Co.* v. *United States,* supra, in which the Court said at page 516:

> "Neither the complaints of the competitors of the carriers in the warehousing business nor the terms of the commission's order are directed at the involuntary storage of goods incidental to transportation. This is the period before or after shipment during which the goods occupy cars or floors without any charge above the strictly transportation rate."

The governing consideration is that wharf storage is furnished independently of the water carrier. It results from an arrangement between the shipper or consignee and the party furnishing the wharf facility, and the carrier has no interest in it. The charge for the service is not included in the carrier's compensation for transportation, and the carrier incurs no liability on its account.

Mr. Differding, one of the Commission's witnesses, takes this view in his testimony, as follows:

> "Mr. Graham: Q. Whereas, on some of the other terminals around the bay which have more space available, revenue plays an important part in this problem?
>
> "A. Yes. Witnesseth the two San Francisco piers No. 45 and 56 and the Eastbay terminals. They were built definitely for the handling of cargo for periods of time, and properly so; whereas the finger piers are the old type and they are under assignment by a *steamship operator who has no interest whatsoever in wharf*

demurrage cargo and he can't be blamed for that." (Emphasis added.) (R., p. 726.)

The definition of "other person" in the first section of the Shipping Act, 1916, is worded as follows:

"The term 'other person subject to this act' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities *in connection with a common carrier by water.*" (Emphasis added.)

Wharf storage cannot be held to be furnished "in connection with a common carrier by water", as it is not a part of transportation. Wharf storage on a terminal facility has no more connection with transportation than storage in a warehouse conducted and operated by a party wholly unconnected with the person furnishing wharf or other terminal facilities.

We submit therefore that the Maritime Commission has no jurisdiction over wharf storage or the rates charged therefor.

Point 6. The Order of September 11, 1941, of the United States Maritime Commission Relating to Free Time, So Far As It Relates to These Appellants, Has No Support in the Evidence

We are concerned primarily with the matter of wharf demurrage and storage rates, and we attack the Commission's finding as to free time because the Government is now urging that its order in respect

to wharf storage be supported because of its effect upon the free time.

In the Court below the Government said in its brief:

> "The Commission is not making any attempt to extend its power to cover rates. The granting of excessive *free* time in itself raises no question of rates—but the discriminatory and unreasonable practices of the respondents in respect of free time cannot be effectively prevented *if by means of nominal or non-compensatory rates the terminals can continue the discrimination and unreasonableness even though to a lesser degree.* Discrimination does not cease to be such merely because it is reduced in degree.
>
> "In order to enforce the observance of reasonable and non-discriminatory regulations and practices, the Commission has also specified that the respondents shall charge compensatory rates, or rather rates more nearly compensatory than those heretofore in effect. The rates approved by the Commission are expressly found to be not in excess of cost, and the charging of such rates is necessary in order to prevent evasion of the Commission's order *for, if the respondents may fix rates after expiration of free time without any control, they can carry on with impunity the discriminatory and unreasonable practices in respect of free time.* Certainly the Commission has the incidental power to prevent evasion of its order; and its order may be justified on this ground alone." (Emphasis added.)

In view of this contention, the order of the Commission in connection with free time allowance becomes a matter of importance and it is not supported by any evidence. Therefore, it is void.

In discussing free time, the Commission says in its report:

> "* * * Generally ten days are permitted except that San Francisco allows five days in coastwise and intercoastal (in-bound) trade and seven days in the foreign and offshore trades (in-bound). But under the stress of competition, most of the larger terminals, in cases of emergencies, extend the free time either to cover the additional number of days of delay to the vessel or in the case of Oakland, to such number of days as 'is warranted and equitable in each individual case', according to the judgment of the Port Manager. This practice appears to be based on the theory that if the shipper is not at fault the terminal operator should waive the demurrage. Obviously, when demurrage is waived, transit shed space, the most valuable in the terminal, is being wasted. This involves a cost which has to be recouped somewhere and it is unreasonable that those shippers who do not use the piers beyond the free time should be forced to bear the burden, either directly or indirectly. This practice also affords an opportunity to discriminate between shippers." (R., pp. 23-4.)

It is apparent that the Commission has two objections on this matter of free time; first, that the extension of free time casts a burden on other

shippers and, secondly, that the element of discretion affords an opportunity for discrimination. Even if we concede the validity of those objections, it does not warrant the overturning of the entire free time structure. If extensions of the free time period, either on a fixed or discretionary basis, is discriminatory, that affords no foundation for an order of the Commission shortening the regular free time allowance set up in the tariffs of these petitioners. In other words, if the order of the Commission had stopped with a prohibition of extension of free time beyond that set up in the tariff, there would be some evidence in the record and some support in the Commission's findings for its order. There is no such evidence nor support for the further step of the Commission in cutting down the fixed free time period of these appellants.

Finding No. 6 of the Commission reads in its pertinent part as follows:

> "That there is a lack of uniformity in, and application of, free time rules, regulations and practices of respondents; and that the manner in which they are applied affords opportunity for unequal treatment of shippers. Said rules, regulations and practices are unduly prejudicial and preferential in violation of Section 16, and unreasonable in violation of Section 17 of the Shipping Act, 1916, as amended. We prescribe, and shall order enforced a regulation providing that free time allowances should be no greater than

the period set forth in Table 1 of this report * * *."

That table reads as follows:

	In-bound Days	Out-bound Days
Coastwise and Inland Waterway	5	5
Intercoastal	5	7
Foreign	7	7
Transshipment	10	10

Mind, we are not speaking now of any extension of free time, but of the regular fixed period which is set up in the tariffs of these petitioners.

It is submitted that there is no evidence to support the action of the Commission in cutting the regular fixed period. The following is all that the Commission has to say about it in its report:

"In *Storage of Import Property,* 1 U. S. M. C. 676, 682 (1937), we said:

The furnishing of valuable free storage facilities to certain shippers and consignees beyond a reasonable period results in substantial inequality of service as between different shippers of import traffic, and is beyond the recognized functions of a common carrier.

"And, in *Storage Charges under Agreements* 6205 *and* 6215, 2 U. S. M. C. 48, 52 (1939), we stated:

All receivers of cargo must use the piers, and any preferred treatment, by charges or otherwise, of certain classes of cargo results in discrimination against other cargo.

"Members of Northwest Marine Terminal Association grant no extensions of free time. They, as well as terminals at Los Angeles, provide 10 days' free time in intercoastal (outbound) and foreign and offshore trades. In other trades these terminals like San Francisco, grant 5 days except that at Seattle and Tacoma the time is 10 days on coastwise out-bound. The California Commission, in *Case No.* 4090, *supra*, after a study of the various factors involved in the assembling and distribution of cargo at San Francisco Bay port, location of points of origin, vessels' organizations, customs clearance, efficient loading and other matters, recommended free time periods, exclusive of Sundays and holidays, as follows:"

Then follows Table 1, above set forth.

* * * * * * *

"Counsel for the Commission recommended the prescription of these periods and exceptions thereto as reasonable regulations under Section 17 of the Shipping Act, 1916. Nearly all of the witnesses who testified on this subject favored stricter free time regulations than those now in effect. With few exceptions, respondents, in their reply briefs, showed little opposition to the periods recommended, most of their comments being directed to the exceptions proposed * * *.

"Upon consideration of the evidence outlined above, the free time period set forth in Table 1 is found to be reasonable and proper. Respondents' rules, regulations and practices with re-

spect to free time, in so far as they permit free time allowances greater than outlined in said table, exclusive of Sundays and holidays are unduly prejudicial and preferential in violation of section 16 of the Shipping Act, 1916, as amended, and unreasonable in violation of section 17 of that act * * *"

I have quoted all the pertinent evidence referred to by the report. If you eliminate the matter of the extension of the fixed period of free time allowance, there is not an iota of evidence to support the Commission's finding that the existing fixed periods of these appellants are unreasonable, preferential or prejudicial. They apply to all shippers alike. Moreover, it is definitely shown by the Commission's own report, that Los Angeles and members of the Northwest Marine Terminal Association, that is, the ports on Puget Sound and the Columbia River, allow ten days' free time in intercoastal outbound and foreign and offshore trades, and that Seattle and Tacoma allow ten days on coastwise out-bound. In the case of Appellants, under Table 1, it would be permitted to grant an allowance of only five days in coastwise out-bound and seven days in intercoastal, foreign and offshore out-bound. As the report recognizes, the existing period as provided in Appellants' tariff is ten days for out-bound intercoastal and foreign or offshore.

There is no fact adduced by the Commission in support of its order that the existing free time provisions of the Appellants' tariff are unreasonable. There is nothing in the record tending to prove them so.

It is respectfully submitted that the Commission should not be allowed to assume to itself the power to regulate rates through subterfuge.

VII

CONCLUSION

Appellants have demonstrated in this brief that the Affirmative Order of the United States Maritime Commission made and issued on September 11, 1941, in the proceedings before said Commission in Docket No. 555, so far as it relates to or affects appellants, State of California and Board of State Harbor Commissioners for San Francisco Harbor is void and of no effect and should be set aside, cancelled and annulled and the enforcement thereof perpetually enjoined for all the reasons hereinabove stated and set out in Points 1, 2, 3, 4, 5 and 6 of Appellants' Argument herein, and

The Final Decree of the United States District Court of the United States for the Northern District of California, Southern Division, sitting as a

Statutory Three-Judge Court, appealed from by the said appellants, should be reversed.

Respectfully submitted.

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Dated: November 5, 1943.

Due service and receipt of a copy of the within Brief of Appellants is admitted this_____ day of November, 1943.

Solicitor General of the United States

United States Attorney

Assistant United States Attorney
Attorneys for Appellees, the United States of America, and United States Maritime Commission

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